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## MUSINGS ON 1978.

*by*

PROF. S. VENKATARAMAN.

The expiring year has been an eventful year both at home and abroad. At home it has been a year of unprecedented floods for the second year in succession causing colossal damage to life and property leaving a trail of woe and misery. It has witnessed the rare phenomenon of one large-scale constitutional amendment abrogating another large-scale constitutional amendment. It has also seen the emergence of the "test tube" baby. Abroad, the year saw the very rare occurrence of election of two Popes within the space of less than two months. An outstanding achievement of the year is the Camp David accord reached between President Anwar Sadat of Egypt and Prime Minister Menachem Begin of Israel and the almost immediate recognition of its importance in the cause of world peace by the award of the Nobel Peace Prize for 1978 on these persons by the Norwegian Nobel Committee on 27th October, 1978. No significant progress has been made, however, in regard to world disarmament or the halting of the manufacture of nuclear weapons. On the other hand steps are being taken to explore the possibilities of manufacturing neutron bombs. Nor have the nations of the world been able to find any satisfactory solution to narrow the yawning gap between the developed and developing nations on the economic-front.

*Whither Hindu marriage?* Transformation of the concept of a Hindu marriage as a *samskara* to a purely consensual arrangement between the concerned parties is being brought about steadily. The Hindu Marriage Act of 1955 had given a fillip to the process. Except for the provision in section 7 as to solemnisation of marriage by observance of the customary ceremonies the Hindu marriage was practically stripped of its moorings in Hindu religion. The extensive amendments to the parent Act by the Marriage Laws Amendment Act of 1976 coupled with the provision in the Child Marriage Restraint (Amendment) Act, 1978 raising the minimum age limits prescribed in section 5 of the Hindu Marriage Act from 18 to 21 years in the case of the male and from 15 to 18 in the case of the female have imparted emphasis to the consensual element in Hindu marriages. The provision for divorce by mutual consent has thrown into focus the fragile character of the matrimonial tie. The Law Commission in its 71st report has recommended that "irretrievable breakdown of marriage" should be made a ground for grant of a decree of divorce, subject to certain safeguards, under the Hindu Marriage Act.

The report pointed out that the grounds for divorce under the Act, as at present, "reflect, in the main, three categories of grounds. The first is the traditional theory of matrimonial fault. The second is the theory of frustration by reason of specified circumstances. The third is the theory of consent. There is, however, no theory of breakdown of the marriage, except to a very limited extent."

One of the conditions suggested by the Commission for divorce on the ground of irretrievable breakdown of marriage is continuous living apart for a period of three years. With reference to divorce, the working of the Family Law adopted in Australia in 1976 will have more than a passing interest to our reformists. A national no-fault divorce law came into effect in that country in 1976. Under the new law a couple need only show that they have been separated for twelve months with no intention of continuing their marriage. Under the new law it is theoretically possible to get a divorce decree the same

day one applies though in the larger cities there is at present a backlog of applicants waiting for a place on the Court calendar. The new law is said to be predominantly beneficial so far to women, to "all those wives who have gotten tired of having their husbands out drinking all night and cannot see anything left in marriage for themselves." The family law also gives children over fourteen the right to a voice in deciding which parent they will live with. As to the popularity of the new family law, it is stated that in the very first year the new law did sharply increase the number of divorces with the figure rising to 57839 in 1976 from 24229 in 1975. It is possible that the jump may be due to the initial rush to take advantage of the law by people who had been unwilling to go through divorce under the old law, which required proof of adultery or of various kinds of mistreatment.

Legislation implementing the recommendations of the Law Commission's 71st Report would render the Hindu divorce laws artistic and complete. If the provision for solemnisation of marriage with customary ceremonies is dropped, and transgression of the minimum age limits for marriage is declared to render the marriage void, and registration of marriages is made compulsory the need for a separate Hindu Marriage Act will disappear. The Special Marriage Act will serve the purpose and the Hindu marriage will go the way of Hindu adoption. But the big question will always be whether the Hindu community is desirous of or ready for such a finale.

*Is World Government inevitable before the close of the century?*—To Mendlovitz, there can be no doubts on the matter. He is firmly convinced that "there is no longer a question of whether or not there will be a world Government by the year 2000 A.D." According to him the questions we should be asking ......"are, how it will come into being.... by cataclysm, drift, more or less rational design, and whether, it will be totalitarian, benignly elitist of participatory"[1]. The thrust of history as well as the emergence of world order values calls for individuals, groups and States to first seek a global identity, an identity in terms of the world as a whole and a global loyalty. The narrower affiliations fostered by nationalism should be corrected by or made compatible with international institutions and programmes activising a sense of oneness, *i.e.*, of belonging to the world as a whole and by inducing nation-States to find their existence in the global framework. A number of world organisations based on international co-operation are already operating in various fields with telling effect. Nevertheless the mental make-up and loyalty of the constituent units has not changed in any appreciable measure. Further a just world order has to reflect maximum social justice, more widely spread economic welfare and abjuring of violence. A shared framework of social reasoning and social calculation is a *sine qua non*. The task, therefore, lies in getting such values accepted and the necessary consensus mobilised.

It is a fact that at the present time there are more independent Governments in the world than at any time before and wider distribution of formal jurisdiction in the international scene tending to make the world Government idea hard to swallow or achieve. A world culture with a sufficiently common framework of values may be easier to realise. The world order idea can appeal and attract only through such factors like shared culture and shared economic benefits.

A world Government has to avoid the danger of excessive centralisation of power and bureaucracy. Some form of institutionalised co-operation between pluralistic communities with a variety of institutions and structural, functional and procedural arrangement would probably be more feasible and an easier goal to achieve.

It is exactly these difficulties in solving the various problems in the way of achieving World Government that make many sceptical about any date line for a World Government. No spectacular or substantial step in this direction has been witnessed in 1978. A world Government seems however a 'must' because there seems to be no better or more practicable alternative to it to avert world destruction. Paul Lin sapiently sums up the position: "The future is bright. The road is hard".

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1. Saul H. Mendlovitz, Editor, On the creations of a world order.

*Is law for sea-bed anywhere near solution?* The seven-week session beginning on 28th March, 1978, of the U. N. Law of the Sea Conference, the seventh in five years has gone the way of the earlier sessions with much talk and little achievement. It all started in 1973 from when the delegates of nearly 150 countries have been shuttling across the Atlantic between New York, Geneva and Caracas without reaching the consensus agreement they are seeking on sea-bed mineral mining.

Agreement had been substantially reached on most topics the conference has discussed but it is the exploitation of the so-called manganese nodules that proliferate on the sea-bed, mainly in the north-eastern Pacific and the Southern Indian and Atlantic Oceans and which for the most part lie outside territorial waters under the "high seas", that has proved an almost intractable problem.

The nodules, according to scientists, represent a potentially massive mineral wealth in terms of their content of not only manganese but also nickel, copper and cobalt.

The amounts of the minerals are estimated in billions of tons, enough to meet world demand at present rates for perhaps thousands of years. There has even been some evidence to suggest that the nodules are constantly being formed, making them a potentially limitless reserve.

The question with which the U. N. conference has been grappling, and which it has so far failed to answer, is; who is to have the benefit of this wealth, which, under current maritime law, is essentially available to anyone who has the ability to pick it up?

The question is not merely academic. The technology to lift the minerals from thousands of feet of ocean already exists, and one international consortium of mining companies has reportedly already spent £20,000,000 in perfecting its techniques on a site in the Pacific.

And the mining companies are becoming impatient with the U.N. diplomats. As the conference has meandered on its inconclusive way there have been growing warnings that, perhaps with the tacit approval of some developed countries, the companies will simply go ahead and begin work unless there is some sign of an agreement in the offing.

The result could be to spark off a massive rush to stake private and perhaps national claims to large slices of the high seas declared by the U. N. in 1970 to be "the common heritage of mankind".

The major point of the discussions in the recently-concluded New York session was provided by the report of the negotiating group regarding the mode of payment by a lessee-contractor to the international regime visualised for the exploitation of the sea-bed. But even the negotiating group did not produce an agreed formula. It produced two formulae. The implementation of one of them would earn for the international authority about $740 millions in 25 years from one mining site. The implementation of the other alternative formula would earn for the authority $1,100 millions. This narrows down the gap between the two extreme propositions discussed at Geneva in the last session.

India, however, has not subscribed to either of the present alternative formulae. It has insisted on its original proposition which envisages the payment of a lump-sum of $60 millions plus production charges and a share in the profits, to the contractor, the total amounting to $1,600 millions in 25 years. However, all the developed countries are opposed to the payment of any lumpsum on the plea that before the commencement of production, the contractor will have to make a sizable investment amounting to between $500 to $600 millions and the payment of a lumpsum will add to the burden. The developed countries feel that the terms should be such as would leave a reasonable profit for the contractor. India feels that the reasonable profit should be between 10 to 12 per cent. of the investment but the developed countries feel that it should be more than 15 per cent.

The Soviet proposition on the other hand is that it cannot subscribe to shares in profits because its own economic system is such where a venture is evaluated not in terms of profits but in terms of social value. It would prefer a payment of production charge at 7.5 per cent. of the investment either in cash or preferably in kind in the form of unprocessed material fetched from the sea-bed. This, however, has been opposed by the other developed countries because the real value of this to the international authority

would vary depending upon the market price of the raw material. The Soviet Union is apparently willing for a compromise on this issue under which the payment could be made in cash or kind but the option could be exercised not by the contractor but by the international authority.

The eighth session of the U. N. Conference on the Law of the Sea will be held for six weeks commencing from 19th March, 1979 in Geneva and it was decided that a further session in August should be held only if there was positive and definite progress in the eighth session.

The progress hitherto achieved is not very encouraging. But as is said often, "constant dropping wears away stones" and "it is dogged that does it". Let us therefore hope that 1979 may have better results to show on this question.

*Is individual thinking a waning feature of modern life?*—Salesmanship in ideas is becoming quite a feature of modern life. Propaganda has become an art and acquired new dimensions. Slogans and catch-words often tend to serve as a smoke screen, and by whipping up emotions and passions on ephemeral and momentary issues attempts are made to cloud the thinking of the common man. High sounding words and euphemistic expression are pressed into service to justify acquisition of power. One is tempted to exclaim:

"Oh, judgment thou art fled to brutish beasts

And men have lost their reason".

It was Gibbon that described history as a "register of the follies, crimes and misfortunes of mankind". Man has been stumbling along from one blunder to another. Even the most costly blunders seem to have taught him nothing. Neither Hiroshima nor Nagasaki could make a radical or real impact on his outlook. The mad race for armaments and nuclear weapons continues unabated. Man is continuing to wage war at present not only against his fellow human beings but on nature also. "Reductionist Scientism" has taken mankind to the brink of annihilation in nuclear holocaust or ecological attrition. It is high time for man to arrest his degeneration and realise that "being" is at least as important as if not more important than "knowing".

*Special Courts to try "Emergency offences".*—A momentous decision rendered by the Supreme Court during the year is that upholding the constitutional validity of the proposals for setting up special Courts to try specified categories of emergency offences committed by persons who had held high public or political office during the period. The opinion was given on 1st December on the President's Reference to the Court under Article 143 of the Constitution made on 1st August, 1978, seeking its advisory opinion on the question. This was the seventh reference made by the President since the inception of the Constitution. On 23rd May, 1951, the Supreme Court gave its first opinion which concerned the provisions of the Delhi, Ajmer-Merwara and Part C States Act. On 22nd May, 1958, the Court gave its second advisory opinion on a reference relating to the Kerala Education Bill, 1957. On 14th March, 1960, it gave the third advisory opinion on some issues relating to the Exchange of Territories (including Berubari) under the Indo-Pakistan agreement of 10th September, 1958. On 10th May, 1960, the Court gave the fourth advisory opinion on the interpretation of Article 289 about the immunity of States from Union taxation. On 30th September, 1964, it gave its fifth advisory opinion on the jurisdiction of the Uttar Pradesh Legislature *vis-a-vis* the Allahabad High Court. On 5th June, 1974 the sixth advisory opinion was given on a matter connected with election to the office of President.

It may be noted that in seeking its advisory opinion, the Government had also taken the precaution of getting the provisions of the private member's Bill on the subject introduced by Mr. Jethmalani, tested by the Supreme Court, which has upheld its legality with certain stipulations in regard to the procedure to be followed for appointing the special judges to try these cases.

The Supreme Court has held that the majority opinion expressed on the constitutional validity of the proposed legislation, even in exercise of its advisory jurisdiction, ought to be binding on all other Courts in the country, which virtually precludes the challenge of the enactment in any High Court. This neutralises and gets over the view generally held earlier (*see* 1944 F.C.R. 317,

320-321), that an advisory opinion has no more effect than the opinions of the law officers.

One of the Judges has also made the interesting suggestion that a permanent statute should be enacted to try political offenders who have in practice remained "untouchable and unapproachable" to the rule of law. It was the lack of will in the past that has been responsible for non-prosecution of cases revealed by several commissions, like the Commissions of Inquiry appointed by the Orissa Government in 1967 (Mr. Justice Khanna), the Commission of Enquiry set up by the Kashmir Government in 1965 (Justice Rajagopala Ayyangar), the Mudholkar Commission against 14 ex-United Front Ministers appointed by the Bihar Government in 1968 and the T. L. Venkatarama Aiyar inquiry ordered by the Bihar Government in 1970.

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# HUSBANDS! HOW FAR ARE YOU LIABLE FOR THE DEBTS TAKEN BY YOUR WIVES?

*By*

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Is a wife agent of her husband?[1] If this question is put directly to a lawyer, the most natural answer to the enquiry would probably be that she is not[2]. But can a wife be designated as agent if urgency in the circumstances may ever require? To this querry a negative reply may not be so clear and emphatic. One cannot give absolute and unconditional answer that she can never be or that she is. Can she at the least be an agent by necessity?[3]

Can a wife be regarded as an agent of her husband for incurring debts for various household necessities or for the personal expenses of her children and herself? And is she entitled to pledge the credit of her husband, on the assumption, that she has implied authority on his behalf to do so? The subject of inquiry has, of recent, assumed great significance due to awakenings like women's liberation movement and gradual breaking up of joint Hindu families.

The first relevant case on the point is *Pusi* v. *Mahadeo Prasad and others*[4]. The facts may be briefly stated as follows: Parmi, the wife of Pusi and her husband's brother jointly executed a bond on the 1st January, 1875 for the payment of moneys borrowed to pay a debt due by her husband and his brothers and hypothecated the family house as a collateral security for the repayment of such moneys. The following passage from the judgment is quoted here:

"Respondents sued not only the obligors, but also the appellant, and claimed to make him liable in person and property jointly with the obligors, for the whole debt; and the lower Appellate Court has allowed the claim on the ground that the husband is liable for the debt contracted by the wife. This liability, however, cannot be imposed except when the wife has had the express authority from the husband, or under circumstances of such pressing necessity that the authority may be implied."

The learned Judges advanced various reasons for not holding the appellant (husband) liable. Firstly the money was borrowed by the wife to pay an instalment of a debt due by the appellant and to obtain money for expenses of cultivation. In such a case obviously the question of the wife possessing an implied authority could not arise in respect of the first item and secondly, regarding the money taken for cultivation, there was no evidence to show that it was in fact required for cultivation for her husband's land or that she personally received any money on that account. The loan was taken for a joint purpose of the Hindu family and hence no implication of authority could arise in the wife to pledge her husband's credit. It was really a surprising feature of the case that the plaintiffs dealt with Parmi, the wife of the appellant, as making the disposal of the property in her own right and did not look upon the husband as in any way responsible for the debt. The learned Judges, having due regard to the circumstances of the case stated above, held that the appellant and his property were exempt from liability in respect of the debts incurred by his wife. The only point that was considered by their Lordships was whether there was such pressing necessity as could be regarded sufficient for giving implied authority in the wife to pledge her husband's credit. This case, undoubtedly shows a narrow approach to the question of the implied authority of a wife to pledge her husband's credit, by the Allahabad High Court, for implied authority may arise not merely on the ground of necessity but from other sources as well, already referred to earlier.

Credit, however, can be given for laying down an important principle of law, though

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1. See Prof. Hanbury Principles of Agency, 2nd Ed., p. 42, where a wife has been treated as an agent with authority to pledge her husband's credit within scope of agency by necessity. As against this, see Powell, Law of Agency, 2nd Edn., at p. 426 where she is excluded.
2. Bowstead on Agency 13th edn., Article 14 at p. 34 and Article 40 at p. 102.
3. *Eastland* v. *Burshell*, (1878) 3 Q.B.D. 432; *Jonsion* v. *Sumner*, (1853) 3 H. and N. 261.
4. (1881) I.L.R. 3 All. 122.

couched in a negative form that a wife can have no implied authority to pledge her husband's credit when the loan is not taken solely for her husband's benefit.

Another case of considerable importance is *Girdhari Lal* v. *W. Crawford*[5], also decided by the Allahabad High Court. Here, a certain Crawford and his wife had lived together ever since their marriage in 1855. The husband had always given Rs. 220 per month regularly to his wife by way of allowance to meet the household expenditure and all her own expenses. Nine or ten years prior to the filing of the suit for recovery of Rs. 589-2-9 by the plaintiff, Girdhari Lal, Mrs. W. Crawford had been borrowing money in her own name by ruqqas or notes of hand from the plaintiff. The loan was taken for paying interest on old debts contracted by her. It transpired from the evidence on record that one of the loans was applied to the payment of the first debt, which was incurred for payment of medicine, during Mrs. Crowford's illness. It was also clear from the evidence that Mr. Crawford knew nothing about these loans and that he never authorised his wife to borrow money. On these facts, the learned Judges laid down the following principles of law:

"The Judge has rightly held that the liability of a husband for his wife's debt depends on the principles of agency, and he can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done. In the present case, the Judge has held that there is no express or implied agency, and the circumstances under which the debts were contracted support this view. It is not a case where agency might be implied, as for instance, of money lent to a wife to meet some emergent need, but of successive borrowings over a considerable period, the debt having increased by high rate of interest. We dismiss the appeal with costs."

The judgment of the District Judge of Cawnpore with which the Allahabad High Court was in complete agreement had stated:

"The husband in this case contends that he is not liable for his wife's debt. It is contended that, being a Government servant, his family could have got medical advice without paying for it, and that Mrs. Crawford was not justified in borrowing without her husband's knowledge to pay off previous debts. I think the transactions are merely simple loan transactions, and no implied agency on the part of the wife can be proved in this case. It is not shown that plaintiff looked to the husband's credit, or that the husband ever paid his wife's debts for her on any previous occasion. It does not appear that Mr. Crawford was to be called on to execute the bond in favour of plaintiff. I, therefore, dismiss the appeal of Mrs. Crawford and accept the appeal of Mr. Crawford and find him not liable for this debt."

The Court's finding that no agency was established between Mr. Crawford and Mrs. Crawford appears to have been based on the following reasons: Firstly, that the husband never authorised his wife expressly to take loan; secondly, the husband never paid any of the debts contracted by his wife; thirdly, there was no necessity to take loan for medicine as this expense would have been borne by Government; and fourthly, the wife never informed her husband as to her taking loan; and fifthly, the plaintiff never advanced any loan to Mrs. Crawford considering her to be agent of her husband, and that he had no reason to believe that she was acting in that capacity. The various reasons advanced by the learned District Judge, Cawnpore, leave no room for doubt that the wife could not be regarded as an agent of her husband for the purpose of pledging the credit of her husband.

The wife, under the circumstances of the case could neither rely on incidental nor apparent authority, nor a course of dealing nor estoppel, nor ratification, nor custom or usage of the trade for playing the role of an agent for her husband. The judgment delivered by the learned Judges of the Allahabad High Court cannot, therefore, be assailed on any ground, but it is unfortunate that the opinion does not discuss the grounds on which authority might have been implied in favour of a wife to pledge the credit of her husband for her

5. (1887) I.L.R. 9 All. 147.

debts. Nevertheless the judgment is significant as indicating the circumstances in which it cannot be so implied.

A case in point is *Firm Baboo Lal-Bhagwan Das* v. *M. Purcell and others*[6], in which Justice Niamatullah stated:—"The learned Judge of the Court below does not appear to have appreciated the points which were in controversy between the parties; as between the plaintiff and Mr. Purcell several questions of law and facts arise. If the sum acknowledged to be due to the plaintiff by Mrs. Purcell on 2nd June, 1934 represented the price of household necessities which were intended for the family consisting of Mr. and Mrs. Purcell, and if they can be considered to be necessary for persons in the position of life occupied by the defendants, the Court may well infer that the wife had authority to bind the husband". But as there was not enough evidence to judge the case on its merits, the learned Judge remanded it to the lower Court to determine: (1) whether the sum of Rs. 600 referred to in the document dated 2nd June, 1934 was due to the plaintiff in respect of necessaries suited to the style of living of Mr. and Mrs. Purcell; (2) whether Mr. and Mrs. Purcell lived together as husband and wife, and the latter managed the household affairs; and (3) whether under all the circumstances appearing in evidence, it is reasonable to infer that Mrs. Purcell had express or implied authority to pledge the credit of her husband for necessaries of life suited to their style of living.

Though the case was not finally disposed of (by the learned Judge of the Allahabad High Court) it is possible to read into the order (passed by him), certain important principles that must be borne in mind while deciding a case of an implied authority of a wife as an agent of her husband. Those principles are that it is necessary to find out from the facts of a case whether the relationship of husband and wife exists in fact, whether the wife is managing the household affairs and further whether the articles purchased by the wife are necessaries according to their style of living and station in life. If all these questions can be answered in the affirmative the Court can decide in favour of the wife as being possessed of an implied authority to pledge the credit of her husband for her debts.

Another instructive case in point is *Kanshi Ram* v. *B. Nisbett Shedman and another*[7], decided by Justice Jai Lal of the Lahore High Court. The principle of law laid down by him may be reproduced in his own words as follows:—"The law on the subject appears to be this, ordinarily the husband is not liable for any debts incurred by his wife merely by virtue of the relationship of husband and wife, but if the wife is managing the household of the husband, then she is to that extent his agent, and binds him for any liability incurred by her in managing the household. If, however, articles of necessity are supplied to the wife then, to that extent, the husband is liable because of his legal duty to maintain his wife and the consequent implied agency of the wife to pledge the credit of her husband. If the husband and wife are living separately by mutual consent and the wife has no other means of subsistence, then the husband can claim to be absolved from liability by proving *inter alia* that under the terms of the separation he had agreed to make her an allowance and that such allowance has been paid by him, otherwise his normal liability to maintain his wife continues".

The judgment delivered by Justice Jai Lal undoubtedly represents the correct law, but it is unfortunate that it does not throw any light on the meaning and scope of the term 'Necessaries' and an explanation of the term would have been of the utmost importance to litigants and Judges alike in future law-suits.

The English law on the subject is to the same effect. Bowstead in his Law of Agency has stated that where a husband and wife live together, the mere fact of cohabitation raises a presumption that she has authority to pledge his credit for necessaries suitable to the style in which they live. Bowstead is supported in his view by the decision in *Paquin* v. *Beauclark*[8].

In a recent case decided by the High Court of Allahabad, *Phulgheri Devi* v. *Mithai Lal*[9], the circumstances giving birth to necessary

1. A.I.R. 1936 All. 869.

7. A.I.R. 1929 Lah. 18.
8. (1906) A.C. 148.
9. A.I.R. 1971 All. 494.

authority of the wife as an agent of her husband were explained. It was observed that a wife, where she and her husband are living together is presumed to have her husband's authority to pledge his credit for necessaries suitable to their style of living. This authority of necessity is founded on the husband's duty to maintain his wife and the right to pledge her husband's credit for necessaries is vested in the wife by implication of law. This presumed authority is confined to necessaries only for existence *e.g.*, buying of drinks, food, clothes etc. suitable to the husband's style of living and belonging to a department of the household usually entrusted to the wife; and if the wife has the management of the husband's household, the authority extends to household, provisions and all other things incidental to the ordinary course of such management.

The presumption that she has authority of necessity does not extend to articles of luxury nor will any authority be presumed when the act done is extravagant in its nature.

This view is also supported by the principles laid down in another English case *Biberfield* v. *Bernas*[10], where it was laid down that if the wife had means of her own sufficiently ample to provide for her own private necessaries, she had probably no implied authority to pledge her husband's credit for such necessaries, as distinct from household necessaries. An illuminating case in point is *Dr. Kanhayalal Bisandayal Bhiwampurkar* v. *Indarchandji Hamirmalji Sisodia*[11]. The facts of the case may be briefly noted as follows:—The case of the plaintiff, an eye specialist was that Laxmibai, a Hindu woman, consulted, and requested him to have the cataract in her eye removed and entered into an agreement to pay for the operation and incidental charges. The plaintiff performed the operation and filed a suit for the recovery of his aforesaid charges against the husband of his patient. The evidence on record showed that the plaintiff directly settled his fees with his patient in her personal capacity and not as an agent of her husband. It was also proved by evidence that Laxmibai was not completely cured of her ailment. The question that arose for determination in this case was whether the defendant, the husband of Laxmibai, could be held liable for the liabilities of his wife, under the circumstances mentioned above. Justice Niyogi of the Nagpur High Court was called upon to decide whether Laxmibai could legally make her husband liable according to sections 68, 70 and 187 of the Indian Contract Act. Relying on some earlier decided cases *Pusi* v. *Mahadeo Prasad*[12], *Kanshi Ram* v. *Nisbett*[13] and *Gomathi Ammal* v. *Avu Ammal*[14], his Lordship laid down the following principles of law:—

"In India, the capacity of a woman to contract is not affected by her marriage, either under the Hindu or the Muhammadan Law. There is no disability attached to a Hindu female; married or unmarried to preclude her from entering into a contract either on the ground of sex or coverture. In terms of section 187, Contract Act, an Indian woman, when she enters into a contract with the consent or authority of her husband, is treated as his agent and her act is made binding on her husband and in certain circumstances the law empowers her even without his authority, to bind her husband's credit...... otherwise a married woman cannot bind her husband without his authority; but she may be liable on her contract to the extent of her stridhan property to the person who deals with a married woman to enter into contract with him as an agent for her husband or as a principal on her own account". The plaintiff had contended that in view of sections 68 and 70 of the Indian Contract Act, the husband was liable for the debt contracted by his wife. This plea was answered in the negative by the learned Judge in these words: "Indeed section 68 deals with the supply of necessaries but that is in respect of a person incapable of entering into a contract or "any one whom he is legally bound to support *i.e.*, the dependant of a person incompetent to contract. Indarchandji was not incompetent to contract, and the section is inapplicable to him. As to section 70, it must be observed that this section cannot be availed

10. (1952) 2 Q.B. 770 (C.A.).
11. A.I.R. 1947 Nag. 84.
12. I.L.R. (1881) 3 All. 122.
13. A.I.R. 1929 Lah. 18.
14. 38 L.W. 321: 65 M.L.J. 355: I.L.R. 56 Mad. 964: A.I.R. 1933 Mad. 686.

of by a person who relied on an express contract as the plaintiff is alleged to have entered into with Mt. Laxmibai in the case. 'The husband never entered into the picture when the plaintiff settled the terms with her. Nor is there anything to show how the husband received any benefit. It is only actual benefit which will furnish a ground of action. If the wife had been cured of her ailment completely, perhaps that circumstance might be material, but there is no evidence on the point. For the foregoing reasons I hold that Indarchandji is not liable'."

The judgment delivered in the above case, though well reasoned, and supported by Indian and English authorities, fails to take into consideration section 233 of the Indian Contract Act, 1872. Section 233 reads:

"In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable".

The section has been interpreted differently by different Judges of the Madras High Court. Coutts-Trotter, CJ., in *Kutti Krishnan Nair* v. *Appa Nair*[15], held that though the wording of section 233 of the Indian Contract Act, 1872, was very unfortunate, it was intended to reproduce the English Law. The relevant portion of the judgment may be stated thus: "I have come to the conclusion that what the section means is that the persons dealing with the person through the agent may at his election sue either or he may sue both of them alternatively in a case where he is not sure whom his exact remedy is against; but I am quite clear on the point that the section can only be construed as meaning that he may sue both principal and agent in the alternative, and that he cannot get judgment against both of them jointly for the amount sued for. That would be to turn a liability which is clearly mutually exclusive into a joint liability". A Division Bench in Madras *T. Muhammad Shamsuddin Ravuthar* v. *M/s. Shaw Wallace and Co.*[16], has however dissented from Coutts-Trotter, CJ. Thus Leach, CJ., observed: "There is no ambiguity in the language used in the section, and I am unable to see anything unreasonable in the rule, which it embodies......"

In an earlier Bombay case *Shivlal Motilal* v. *Birdichand*[17], it was held that the section created a joint liability. In the light of these judicial pronouncements, and also looking to the plain meaning of the language of section 233, it is difficult to give it a meaning other than that which commended itself to Leach, CJ., and his brother Judge in Madras.

Niyogi, J., of the Nagpur High Court stated in his judgment that the plaintiff not having proved that Laxmibai entered into a contract with him as the agent of her husband could not make him liable. For the reasons stated above, it is respectfully submitted that the decision is erroneous.

It may thus be concluded that the liability of a husband for his wife's debts depends on the principles of agency but the husband can only be liable either when it is shown that he had expressly sanctioned what the wife had done or when there was such a pressing necessity that it was in the circumstances the only reasonable and prudent course to take. The liability of the husband does not arise out of marriage but it owes its origin entirely to the legal duty of the husband to maintain his wife and consequent implied agency of the wife to pledge the credit of her husband. This liability is clearly limited to what is absolutely necessary for the wife in the circumstances of the case and the nature of the household activities, but it in no case extends to include debts that are incurred for purchasing luxury items or that are by themselves extravagant in nature. It can in no way extend to acts which are clearly outside the ordinary course of business and which are neither necessary nor incidental to alleged authority. The relevant law in India flows out of section 189 of the Indian Contract Act and English Law on the subject does not differ from Indian Law in any material term.

15. I.L.R. 49 Mad. 900 : 51 M.L.J. 311 : 24 L.W. 451 : A.I.R. 1926 Mad. 1213.

16. (1939) 1 M.L.J. 509 : 49 L.W. 343 : I.L.R. (1939) Mad. 282 : A.I.R. 1939 Mad. 520.

17. (1917) 19 Bom. L. R. 370 : 40 I.C. 194.

## HIGH COURT IN FULL STRENGTH.

It is a rare happening in the annals of the High Court for nine Judges, seven permanent and two additional, being appointed at the same time. Mr. Justice M. A. Sattar Sayeed, Mr. Justice Satyadev, Mr. Justice Natnar Sundaram and Mr. Justice Maheswaran, at present Additional Judges, have been made permanent Judges with effect from the dates of their assuming charge. Mr. P. Venugopal, Mr. S. Swamikannu and Mr. V. Ratnam have been directly appointed as permanent Judges. Mr. K. Shanmukham and Mr. R. Sengottuvelan have been appointed as Additional Judges for two years.

Ever and anon it has been pointed out that a main contributory cause for the heavy back-log of cases pending in the High Court is Government's failure to fill up vacancies in the ranks of Judges as and when they occurred and pusillanimity in making appointments up to the sanctioned strength for the High Court over a number of years however strong a case was made out in that behalf. It is no doubt true that mere number may not count but the appointees should also be of the proper calibre and competence. In this context, it is useful to recall the admonition of the Sukra Nitisara: "The Judges appointed by the King should be well-versed in procedure, wise, of good character and temperament, soft in speech, impartial to friend and foe, truthful, learned in law, active and free from anger, greed or desire". Equally significant is what a retired Judge has recorded in his "Memoirs": "A Judge's position is very different in these days; it may be, he may come from a particular party or persuasion, but he must keep himself aloof from his past associations once having accepted a judicial post, lest any unnecessary blame be thrown against him even for correct decisions which he may give on the facts and law of such cases". These are norms to which every Judge has to measure up. Now that the Government has removed a root cause for the accumulation of arrears in the High Court these should gradually and steadily melt away without leaving room for any reproach of hurried or hustled justice. It is our fervent hope that with the present accession of strength the arrears problem will be successfully tackled. The time for assessing the work and worth of a Judge on the Bench is when he retires, not till then. At the moment we can only convey our respectful felicitations and good wishes to the new incumbents. We assure them of the full co-operation of the members of the Bar, the other wing in the administration of justice.

The profiles of the newly appointed Judges are given below.

Mr. P. Venugopal, senior-most Judicial Member in the Southern Region of the Income-tax Appellate Tribunal, won the "Wallace" scholarship for proficiency in the Madras Law College. He practised at the Bar between 1944-1950 and later served as District Munsif, Sub-divisional Magistrate, Assistant Judge-*cum*-Registrar, City Civil Court and was promoted as Sub-Judge. He was Deputy Legal Adviser, Ministry of Law, since July, 1961 and Additional Legal Adviser since April, 1965. He was selected as Judicial Member, Income-tax Appellate Tribunal in October, 1968.

Mr. S. Swamikannu, Principal Sessions Judge, Madras graduated from Pachaiyappa's College and took his M.L. degree with distinction. He was Editor, "Indian Law Reports" Madras series and part-time Lecturer in the Madras Law College. He was for sometime Junior to Mr. K. Narayanaswami Mudaliyar, now Law Minister. He was appointed District and Sessions Judge in September, 1964. He was Industrial Tribunal in 1970 and later Chairman, Sales Tax Appellate Tribunal and Chief Judge, Court of Small Causes, seniormost Selection grade District Judge in the State, He recently heard the "Wheat Deal Case". He is also a member of the Rules Committee, Madras High Court and President of the Madras District Legal Aid Society. He is proficient in Sanskrit also.

Mr. V. Ratnam, is the son of Mr. A. V. Viswanatha Sastri, who was a Judge of the Madras and Andhra High Courts. His is the second instance of father and son adorning the highest judiciary, the other being that of Mr. P. Venkataramana Rao and Mr. P. V. Rajamannar. After his enrolment he worked in the chambers of Mr. Ramachandra Iyer. He was elected Secre-

tary of the Madras High Court Advocates' Association in 1976 and re-elected in 1978. He was Member of the Editorial Board of the Madras Law Weekly. He is connected with social welfare and service organisations in Madras.

Mr. K. Shanmukham, was enrolled on 1st August, 1949. After-working for about 14 years in the chambers of Mr. K. Rajah Aiyar and Mr. K. Srinivasan, he set up independent practice in the High Court.

Mr. R. Sengottuvelan, Advocate, Coimbatore was enrolled in 1951 and had worked as a junior under Mr. Justice P. S. Kailasam. He was the President of Coimbatore City Co-operative Bank Limited for the past 14 years and is connected with various religious institutions. He has specialised in endowment cases.

## GOLDEN JUBILEE OF THE MADRAS BAR COUNCIL.

It is a matter of pride and satisfaction that the Madras Bar Council celebrated its Golden Jubilee on 17th February, 1979 with great eclat and enthusiasm and in a purposive manner. A highly gratifying feature was the presence and participation at the function of the Chief Justice of India (Justice Chandrachud), the Chief Justice and Judges of our High Court, former Judges, legal luminaries, the Chief Minister of our State and a large number of advocates.

The Bar Council has at present more than 12,000 advocates on its rolls and to them all the occasion was one to be cherished. In England, the Inns of Court are essentially private societies membership in which entitles a person to audience before the Courts. Through the Inns there is the close professional organisation of the Barristers and it is relatively easy to enforce discipline among them. Since November, 1966, a Senate of the Inns of Court has been established to provide a single body which could act on behalf of the Inns collectively in matters of common interest in which a common policy is needed. The disciplinary powers have become vested in it since 1st April, 1967. In the United States of America, there is nothing comparable to the Inns of Court. Lawyers were admitted to practice by the Supreme Court of each State and the admission entitled them to practice in that State. In recent times some of the States have passed statutes or made rules of Court establishing what is termed 'Integrated Bars'. Under this system every lawyer must apply to the State Bar and its Board of Governors enjoys a somewhat official position. On a nation basis was the American Bar Association with a membership of more than half the total number of lawyers in the country. The American Bar Association and the State Bar Associations have Committees on Professional Ethics for the guidance of lawyers in their practice. In India the Bar Council is a statutory body. There is a Central Bar Council and there are State Bar Councils.

The first Bar Council in Madras was constituted on 9th October, 1928. Besides the Advocate-General (Mr. C. V. Ananthakrishna Aiyar) who was its chairman, the Council consisted of a galaxy of eminent members of the Bar—Messrs. S. Srinivasa Iyengar, T. R. Ramachandra Aiyar, T. R. Venkatarama Sastri, Alladi Krishnaswami Aiyar, T. Rangachariar, K. Bhashyam Iyengar, P. Venkataramana Rao, K. P. M. Menon, K. S. Krishnaswami Iyengar, S. Doraiswami Aiyar, Nugent Grant, Mahomed Ibrahim, C. Venkatachalam Pantulu and T. A. Ramalingam Chettiar—every one of them a name to conjure with and inspire, bringing lustre and prestige to the Bar Council making it second to none in India. Since then, over the years the Bar Council has been functioning well and discharging its duties creditably. The reputation of the Bar Council will always depend upon the informed and dedicated approach by the individual members to the various matters coming up before them and the degree of responsibility displayed in arriving at conclusions. As Justice Ismail is reported to have observed 'it is to be hoped that a time would come when there was no complaint from any client against any advocate'.

The Bar Council was formed *inter alia* to consolidate the law relating to the legal practitioners entitled to practice in the High Courts. The wind of change however has been steadily blowing and with the changing times the originally contemplated functions for the Bar Councils became inadequate and it was felt necessary to set up autonomous State Bar Councils and an All-India Bar Council with wider powers and responsibilities. The Advocates Act of 1961 under which the new Bar Councils have been constituted is a comprehensive law relating to the legal practitioners and the legal profession. The Councils are now empowered to admit persons as advocates on their rolls, to determine cases of unprofessional conduct against advocates, to safeguard the rights, interests and privileges of the profession, to promote and supplement law reform, to organise legal aid for the poor etc. The Bar Council of India is concerned with the promotion of legal education in the country and lays down the standard of such education and exercises general supervision and control over State Bar Councils.

Various aspects of law and the legal profession came in for discussion during the Jubilee celebrations. It was a welcome suggestion of

the Chief Justice of India that the law excluding advocates from appearing before certain tribunals should be removed. Apropos the suggestion that the Supreme Court should be located at a central place instead of at Delhi conflicting views were expressed. The arguments based on 'brain' and 'heart' respectively are no doubt good debating points but are hardly conclusive on the question. It is indisputable that Supreme Court litigation causes considerable hardship particularly to the people of the southern States because of the distance factor and incidental problems. We have always been of the view that a Bench or Benches of the Supreme Court should sit at convenient centres.

With revolutionary changes in social life and economic conditions the Bar seems to have suffered somewhat in regard to the prestige and reverence accorded to it. It is for the Bar Council to suggest measures in particular, to recapture leadership in public life for which the profession was known earlier, to find ways and means of enabling the less fortunate members of the Bar to make a reasonable living, to get the profession effectively involved in legal aid programmes, and to ensure against fall in standards of efficiency and remove the reproach that the law colleges attract only the 'rejects' of society.

We offer our hearty felicitations to the Madras Bar Council on completion of fifty years of useful work and our best wishes for its growth from strength to strength.

We publish with pleasure the address of our Chief Justice on *RULE OF LAW: ROLE OF LAWYERS* and the Speech by Mr. R. G. Rajan, Vice Chairman, Madras Bar Council.

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## TAMIL NADU BAR COUNCIL GOLDEN JUBILEE CELEBRATIONS—17-2-79.

*Speech by* R.G. RAJAN, *Vice Chairman.*

On this remnicent and jubilant occasion, it is but natural that we look back to the birth and growth of this august body. The earliest law relating to legal practitioners in India is the Legal Practitioners Act XVIII of 1879, which recognised the existence of various classes of legal practitioners like Advocates, Vakils, Attorneys, Pleaders and Mukdars. Apart from admission of legal practitioners and issue of Certificates, the High Court had the jurisdiction on disciplinary matters as well.

The Indian Bar Councils Act of 1926 was enacted for the constitution and incorporation of Bar Councils for the High Courts and to confer and impose duties on such Bar Councils and to consolidate the law relating to the Legal Practitioners entitled to practise in High Courts. For every High Court, a Bar Council was constituted. In short, enrolment of Advocates was done by the High Court; Cases of professional misconduct were dealt with and decided by the High Court, the Bar Council being required to hold up a preliminary enquiry and submit its recommendations.

The first Bar Council for Madras under the Act was constituted on 9th October, 1928. The then Advocate-General Rao Bahadur Sir C.V. Ananthakrishna Iyer was its first Chairman. Sir Murray Coutte Trotter, the then Chief Justice of Madras inaugurated the Council. It will be very important to note that in the first Bar Council the following Jurists and the leaders of the Bar were the Members :—

**Sarvashree :**

1. S Srinivasa Aiyangar
2. T.R .Ramachandra Iyer
3. T.R. Venkatarama Sastri
4. Alladi Krishnaswami Aiyar
5. T. Rangachariar
6. K. Bashyam Iyengar
7. P. Venkataramna Rao
8. K. P. M. Menon
9. K S. Krishnaswami Aiyangar
10. S. Doraiswami Aiyar
11. Nugent Grant
12. Mohamed Ebrahim
13. C.Venkatachellum Pantulu, and
14. T.A. Ramalingam Chettiar,

Eminent members of the Bar served as members of the Council from time to time

The legal profession naturally felt that consistent with the status it had attained, lawyers should be recognised as an autonomous and self-governing body and that there should be unification of the Bar. Originally there were many degrees and classes of legal practitioners, some were entitled to practise in certain Courts only. Some could practise only in the Districts and not in the High Court. An advocate enrolled in one High Court could not as of right practise in the High Court of another State or appear and argue a particular case except with their permission. It was long felt that it was an anomalous position detracting from the dignity and efficiency of the profession. The different grades and the territorial limitations had no material relevance to the administration of justice and it was felt that there should be a unified Bar of the whole country and every one who possessed the standardised qualification should be entitled to carry on his profession in any part of the country. It was in those circumstances that the Advocates Act of 1961 sponsored by our friend Thiru C. R. Pattabhiraman was passed prescribing certain qualifications to operate throughout the country, the possession of which enabled the holder to be enrolled as an Advocate. There was to be a Bar Council in each State which would maintain a roll of advocates and issue certificates of practise to them. All the State Rolls were to be combined and a common roll maintained by the Bar Council of India which was the Supreme Authority and the appearance of a name on the common roll would entitle its possessor to practise throughout the country.

The Advocates' Act is a comprehensive measure and the functions of the Bar Council established thereunder have been considerably enlarged. The Bar Council now consists of 20 elected members besides the Advocate-General as an Ex. Officio Member. It will be interesting to note that the British counterpart consists of the Attorney General, Solicitor General, Chairman of the Council and 48 elected members from out of the practising Barristers of the whole Bar, and an additional eight members as the Council may consider it desirable to appoint by reason of Parliamentary or professional position. There is only one General Council in England. Since there are numerous States in our vast

country each having a High Court, there is a separate Bar Council in each State with a Central Council at the seat of the Supreme Court having a supervisory jurisdiction over all the State Councils.

Under the Advocates Act the functions of the State Bar Councils are to admit advocates on their rolls, to prepare and maintain such rolls, to safeguard the rights, privileges and interests of advocates and to promote law reforms and to decide cases of professional misconduct brought against advocates. Bar Councils are also expected to constitute a fund for giving financial assistance to disabled and indigent advocates. It has maintained a good library for the benefit of the advocates and holds periodical lectures, and seminars on current legal problems.

The Madras Bar Council was reconstituted under the Advocates Act on 11th November, 1961. In the year 1926, when the Bar Council was first constituted, there were about 1,670 advocates in the composite Presidency of Madras. Subsequently, the State underwent reorganisation and after the formation of the Andhra State and inclusion of certain areas in Karnataka and Kerala States, in the year 1960, there were 4,420 advocates on the rolls; in 1970 there were 8,700 and in January, 1979, 12,500.

For the increased activities of the Council, the small accommodation given by the High Court, within its premises was not sufficient and due to the expanded and increased work of the High Court, the High Court was exercising pressure and sought eviction of the Council from the High Court premises. This enabled the Council to put up its own premises within the High Court compound on the plot of land generously given on a long lease by the Government and it was opened on 14th February, 1971 by the then Governor of Madras, His Excellency Ujjal Singh.

The Bar Council is also maintaining a library for the benefit of the legal practitioners. The library has to be expanded and brought uptodate. The Bar Council is anxious to provide suitable aid and assistance to the District Bar Associations to maintain a well equipped library. For this noble and essential purpose resources have to be increased. Except the enrolment fee, there is no other source of income for the Council and the question of levy of periodical renewal fee is a matter worth consideration. This will augment the resources and also enable the Council to have its roll of advocates corrected from time to time. In this context, it will be useful to refer to the recovery of library cess along with the property tax from which the Government may consider diverting part of the same for building up a good library by the Council as well as by the District Bar Associations.

It is no gain saying that the Bar occupies a very important position in the cross-section of the society and plays a vital role in building a good society. It is in the public interest. a well equipped and contented Bar should be developed. The Hon'ble Chief Justice of India at the recent Bangalore Seminar referred to various measures for maintaining the welfare of the advocates, both intellectual and material. For developing intellectual welfare it was pointed out that facilities for good libraries and conduct of refresher courses and frequent group discussions should be made available. On the material side particularly rendering aid to disabled and indigent members suitable benevolent schemes should be planned and maintained. The group insurance as formulated by U.P. Bar Council with the assistance rendered by the generous gesture of the then Chief Minister Mr. Bahuguna is a pioneer and example in this direction. Our Bar Council is evolving a more comprehensive scheme and we hope that one such scheme would be finalised in this year and it should be a pattern and exemplar. Secondly the question of maintaining Provident Fund Scheme for self-employed professionals and provision of aid for the indigenous and unfortunate, the institution of a welfare trust with the assistance of the Government, the High Court and the Bar Council is under the active consideration of the Council. In this context it has been repeatedly suggested by various Bar Councils and Bar Associations to set apart a small percentage of the court-fees collected or levy a surcharge or a cess earmarked for the benevolent schemes for the Bar.

During these 50 years the Madras Bar has contributed distinguished and eminent lawyers reputed for their erudition, lucidity, learning and astuteness and have built up very high tradition, prestige and dignity. So looking back we have get a proud history even though we have lost our geography by States Reorganisation. It is the endeavour of our generation to maintain that tradition

and to contribute their own in building up the high standards in the profession.

It will be significant to refer to the national history of India from 1928. It was during this period that Mahatmaji came to the Indian political scene and led the struggle for Indian Independence. Members of the Bar all over the country played a magnificent role and gave their lives. Very large number of Members of the Madras Bar, from all over the State, threw themselves in the freedom movement and mention has to be made of the great stalwarts who sacrificed their all for the national cause, *viz.*, Salem Vijayaraghavachariar, S. Srinivasa Aiyangar, Rajaji, T. Prakasam, S. Satyamurthy, K. Bashyam and others.

At present there are as many as thirteen endowments admitted by the Trust in the names of Eardley Norton, Sir C.V. Kumaraswamy Sastri, Sir Edward Wallace, Mr. Alladi Krishnaswamy Iyer, Justice K.S.K. Iyengar, Sir C.V. Ananthakrishna Iyer, Justice S. Panchapakesa Sastri and Mr. K.S. Naidu. The proceeds are earmarked for prizes and for best essays, dissertation or thesis and open mostly to junior members of the Bar. On this memorable Golden Jubilee, we are happy to report that four members of the Bar Messrs. V. Rajayya, R.G.Rajan, P.N.Ramaswamy and B.R.Dolia have come forward with five more endowments about which details will be announced later. We may remember the classical treatise by the late K.V. Krishnaswamy Iyer, on professional conduct and etiquette. One of our leaders of the Bar Mr.T.V.Viswanathan Iyer who had himself instituted a prize in his name has undertaken to re-edit the book and re-issue so that a free copy of the same may be given to an advocate at the time of enrolment.

Law was defined by the late Rt.Hon'ble Sir Tej Bahadur Sapru, the legal prodigy of India as "common sense" codified, and the Father of the Nation Mahatma Gandhi defined "Dharma" as nothing but good conscience codified. On this solemn and memorable occasion, the Bar Council reaffirms its faith on the maintenance of the Rule of Law and Dharma and we look forward to the distinguished guests of the evening for their guidance and directives.

JAI HIND

## BAR COUNCIL OF TAMIL NADU

### Rule of Law– Role of Lawyers

*by*

*Hon'ble Thiru Justice* T. RAMAPRASADA RAO,
*Chief Justice of Tamil Nadu.*

The dissertation on the subject of Rule of Law and Role of Lawyers has been the subject of deep insighted articulation after the advent of our Constitution. The principles of equality,—reasonableness and natural justice, enshrined in our Constitution compel our noble profession to train ourselves as efficient social engineers through the upto-date know-how as to the technique of socio-economic progress. The interests of society or public interest is not the concern only of the Administrators or the State in general but also of the well-instructed lawyer. The role that lawyers can play in a democratic country like ours should aim at striking a balance between hope and reality. Mere optimism expressed on platform cannot be a ready panacea for the improvement of the Bar *vis-a-vis* our national problems. An active participation in the movement of enlightenment which touches upon clean, decent and good public living is necessary. For a fringe achievement of this noble objective, the Bar should not treat the profession as a means for a private or domestic end, but should strive to understand the fathomic needs of society, particularly, the weaker sections, and extend an arm of help to those who need it or call for it and be ready to give succour whenever called upon.

To quote the watch-words and canons of the American Bar Association :

"....Where the stability of the Courts and of all departments of governments rests upon people, it is peculiarly essential that the system for establishing and dispensing justice be....so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration......It cannot be so maintained unless the conduct and motives of our profession are such as to merit the approval of all just men."

If the legal profession strives to attempt to perfect the graceful truths contained in the above canons, then the need of the hour is a self-imposed restraint, so that the ethics in the profession are brought out fully and their meaningful import felt by those who approach you. It is necessary for the members of the Bar to prevent the generation and spread of baseless rumours whether it is against their brother-members or the judicial system. As perfection is not in our hands, but only the prerogative of Providence, a pulsating sympathy has to be thought of while picking holes on others apart from you. A reverential respect for the judiciary is indeed a social obligation of civilized citizenship. The practice which is slowly creeping in, of persons not being professionals representing others' causes has to be deprecated. Even in our medieavel times there is ample proof that no one unconnected with the litigant can plead a case for him. Professional expertise being the badge of efficiency, only trained lawyers should take the cause of others to subserve thier interests well. In a Book on Administration of Justice, the learned author has sought particularly to emphasize:

"A high standard was expected of Vakils in consonance with the dictum of Omar, the Second Caliph of Islam who said that the practice of the law was to be in good faith and ought to be pursued in sincerety as a calling."

Even the East India Company by its Regulation VII of 1973 purported to lay down certain norms to regulate the *inter se* dealing of lawyers with the public. By march of time, it is now beyond doubt that a lawyer is an officer of Court. The ethics of the profession now comprehended within the framework of the Advocates Act, compel a lawyer to be not only dutiful to his client, but be equally responsible to the Court. Thus, the profession of law having come to stay as an indispensable concomitant, towards society for securing impartial justice, it is your duty on a day when you are celebrating the Golden Jubilee to re-dedicate yourself to the ideals for which it stands and live upto them now and for times to come. You should function as a sentinel to see that the State and our Legislature do not devitalise fundamental rights, but advance the strict observance of fundamental duties also and stem any attempt by any one how high-so-ever to block the guaranteed progress of society and the common man.

Whilst such are your domestic duties, you have also another obligation towards the judiciary. The institution of judiciary being the citadel of justice, and you being the

liaison seeking for justice, genuine comment is always welcome, but deliberate denegration of the judiciary with a design or a motive has to be discouraged in your own interests. The State, the subject and the lawyer should give the highest respect and honour to the judicial system and in turn, we, the Judges assure the Bar that we will never enlarge justice beyond the necessary perspective, nor concurrently fear to carry it to the fullest extent as duty and judicial conscience requires.

*Fiat Justitia Ruat Caclum*=Let justice be done even though heavens fall.

An eminent Chief Justice said that there are five attributes of a lawyer:

1. Counselling:
2. Advocacy;
3. Improving his profession, the Courts and the law;
4. Leadership in moulding public opinion; and
5. The unselfish holding of a Public Office.

I am here concerned with the third attribute of yourself – Improvement of profession, the Courts and the Law. Improvement of any institution is fraught with difficulties. You are now faced with the rather unpleasant exercise in which I am also involved, in our Courts, to speed up disposals. The arrears in our Courts are appalling. An effective approach by you as Members of the Bar is the need of the hour. We, as Judges expect your unstinted co-operation in the matter of clearance of the heavy backlog of cases. The guide lines for action have to be set by you as a body. Any amount of pressure from the Bench for the early closure of the case will not bear fruit. It is your innate enthusiasm in dealing with the subject is the *sine qua non*. As my Lord, the Chief Justice of India has been encouraging written arguments in a rather fact-packed and law-inspiring case this is one of the media you can adopt to help the litigant to avoid the oft-expressed criticism against law's delays. You could also by self-restraint and deliberate avoidance of the Court's record unnecessarily, scissor the rather uncontrolled filing of cases and keep it in safe bounds and well within decent periphery. As the common man cannot wait indefinitely to gain his legitimate privileges, it is but proper that lawyers do not talk of principle while masquerading a bare privilege. You should, therefore, be one with us as Judges if we are persistent in the clearance of old cases in preference to the later ones. We welcome any radical and rational reform towards the goal.

An eminent jurist said:

"We are passing through an age of social questioning. There is all round a spirit of iconoclasm. The gods we worshipped till yesterday have been slowly and gradually dethroned from the minds of the people. No institution can take for granted the reverence of the community. The community demands from every institution the justification of its existence the proof of its utility. There was, at one time, an aura about the profession, it created a sense of mystification about it in the minds of the people. Under the cover of that, we could hide some of the shortcomings and drawbacks of the profession. To some extent, we, in the world of law have thus thrived on the ignorance of others. Such a time is now past and no more. The legal institutions, the Courts and the profession, have now to earn reverence through the test of truth. It, therefore, becomes essential that we do a bit of heart-searching and indulge in a bit of introspection. If, in the process, we discover drawbacks and infirmities, enlightened self-interest demands that we should set the same right."

Thus, in the course of improvement of the profession, I remind you that we both, the Lawyers and Judges are seekers of truth. Where is truth? The truth of life is not on the mountain top, but in your broken cottage, in the mart, in the factory, and the farm, in the peasant and the toiler. The Lord in *Gita* says:

"Be strong;

We are not here to pray, to dream, to drift;
We have hard work to do and loads to lift;
Shun not the struggle face it; it is God's gift."

Purged of passion and greed, if you as members of the noble profession, steer clear the onslaught of laziness, you can certainly improve the image of an Institution of Law and make the Rule of Law felt and the Role of Lawyers exemplified.

One other aspect which is noteworthy to draw upon amidst this august gathering is legal literacy. Eminent Judges of the Supreme Court Sri Justice V.R. Krishna Iyer, and Sri Justice Bhagwati are sparing no pains to imprint in the minds of all concerned the imperative need of legal literacy. The cumbersome, costly and dilatory judicial system at present availing makes the poor litigant shudder. As a body, you should spare no pains to stimulate the Legal Aid Bureau which is functioning in every District in our State. In the words of Justice V. R. Krishna Iyer :

"Legal Literacy about legal aid to the weak must reach those in towers of power so that legislation, action-oriented projects, delimination of inhibitive hierarchy and deletion of dilatory officialese can be accomplished and a beautiful blend of voluntary agencies and statutory bodies enjoying autonomy and avoiding politicking, may cover penurious areas and prevent the poor from being priced out of the justice market."

Both the learned Judges of our Supreme Court have recently drafted a Legal Aid Bill which I commend for your impartial reading. Every nerve should be strained to see that a reformation is brought about in law so that the poor, the have-nots and the suffering millions who have rights but who do not know their rights are protected by your humane hand of help being extended to ameliorate their sufferings. Article 39-A of the Constitution compels you to involve yourself in that philosophy of Legal Aid. While it is true that you have duties towards your own clientele who maintain you, yet in order to ensure sociological progress and to make the Rule of Law dynamic a few hours spent for the sake of the poor of our country will certainly take you to lofty heights of recognition in the ethical field of love. There is no religion higher than love. Truth shines with the light of love. Be true to love and so follow love and compassion until you touch the core of love and know that to love one is to love all and to avoid one is to wound all. My appeal to you is that you should with a sense of responsibility enter the arena of action and involve yourselves in the laudable scheme of Legal Aid to the poor so that Courts may not be encumbered with avoidable litigation.

## "THE UNPRECEDENTED LAWYERS' AGITATION".

*By*

K. PARASARAN, *Advocate*.

Abstention of lawyers from Courts is a very serious and drastic step. It should be a desperate step of last resort, even if justified. The legal implications of abstention of lawyers from Courts is summarised as follows[1]:—"*Boycott of Courts*—It is reprehensible for an Advocate, as an Officer of Court, who is to assist the administration of justice, to boycott Courts of law and thereby impede, obstruct or prevent administration of law. Such conduct constitutes ground for disbarment or suspension (*Emperor* v. *Rajanikanta Bose*[2]). It is also improper for a lawyer to abstain from appearing in a Magistrate's Court in pursuance of the resolution of the Bar Association without first obtaining the consent of his client (*In the matter of a Pleader*[3]). To say the least, it is most unfortunate that the members of the Bar Association, representing a noble profession, should take part in such activities and pass such a resolution (a resolution passed to boycott Courts in connection with the agitation for a separate Telengana). If the learned counsel or the members of the Bar wanted to take part in such agitation, the proper procedure is to have intimated to the party and withdrawn from the case or from the profession, but not to boycott Courts and have the appeals dismissed for defaults. This sort of conduct on the part of the advocate cannot be pardoned on any principle known to legal ethics, *Deconda Venkataiah* v. *Bobbili Mallaiah*[4].

If still there was such a complete and successful abstention of lawyers from Courts for a couple of weeks it is fully justified. The cases referred to in Majumdar's Book are however distinguishable and do not apply to the facts of the present agitation. In *Emperor* v. *Rajanikanta Bose*[2], "the abstention is alleged to have been due to causes wholly extrinsic to the administration of justice, namely, the act of the civil administration in regard to some Tea-garden coolies—a matter in which the Pleaders concerned and others may have been rightly interested in their personal capacity, but with which *qua*-pleaders and as a body of legal practitioners they were not concerned" (at page 787). Similarly the rulings in *In the matter of a Pleader*[5] and *Deconda Venkataiah* v. *Bobbili Mallaiah*[6], can be distinguished as not applicable to the facts of the present agitation. On the other hand, there is a precedent as a fact though not as a judicial pronouncement, to support the present agitation on principle. There was abstention of lawyers from Courts throughout India at the time of supersession of Judges in relation to the appointment of the Chief Justice in the Supreme Court. That was as in the present case, based on the principle that the independence of the judiciary should be maintained.

The Government made a proposal that it will appoint a Commission of Inquiry with a Judge, a Police Official and a lawyer's representative. The reason given by the Government for constituting such a Commission was that since a Judge is one who has come from the Bar, the Police may not have—confidence in such a Commission if a Judge alone is appointed as One-man Commission. That means a high executive of the State is prepared to share the apprehentions of the Police that whenever a Police official is involved, unless a Police official is also associated with the Judge, the enquiry may not be fair, and impartial. This cast a slur on the independence of the judiciary and impartiality of the Judge. In the positions they occupy it will be difficult and embarrassing for the Judges to react to such views shared by a high executive of the State.

The members of the Bar owed a duty to vindicate the Bench and the Bar. It would have been difficult to demonstrate it by reason alone. The lawyers were therefore justified in abstaining from Courts to demonstrate

1. Conduct of Advocates and Legal Profession—Short History—By N. Dutt Majumdar p. 13.
2. (1923) 71 I.C. 81: I.L.R. 49 Cal. 732.
3. (1924) I.L.R. 2 Rang. 265: 82 I.C. 712.
4. (1971) 2 An.W.R. 89.
5. (1924) I.L.R. 2 Rang. 265: 82 I.C. 712.
6. (1971) 2 An.W.R. 89.

that if a high executive of the State has apprehensions on the impartiality of the Judges, they would not appear before such Courts. Hence the correctness of the attitude of lawyers in abstaining from Courts. If the said high executive realised its mistake and expressed confidence in Courts, the impartiality and independence of the Judges are vindicated.

Even if the abstaining lawyers have gone wrong in resorting to this type of agitation (assuming but not conceding), the matter can still be justified. During the period of Emergency, the doors of the Temple of Justice were closed for about a year for enforcing personal liberties. This was a result of a judgment of the Supreme Court by a majority of 4 to 1 in *A. D. M. Jabalpur* v. *S. Shukla*[7]. That majority judgment has now come under criticism and the dissenting view has been commended by jurists and distinguished lawyers. If the majority had decided in the way the minority did, the temple of justice would have been open for citizens to enforce personal liberties even during the emergency. Emergency of that type was a new experience to this country. Even experienced Judges rendered a judgment which resulted in the doors of temple of justice being closed for enforcing personal liberties. The incident and the agitation of the present type is a new experience for the lawyers. To err is human.

Happily now the Government of Tamil Nadu has announced the appointment of a Sitting Judge of this Hon'ble Court as sole member of the Judicial Enquiry. That means the Government has realised the earlier mistake and has now demonstrated that it has full confidence in the Judges. On this position, there will hereafter be no justification irrespective of the merits and demerits of the demand for lawyers to resort to abstention from Courts.

It is also now necessary in the form of a referendum to have the opinion of all the lawyers practising in India ascertained as to whether abstention from Court by lawyers should or should not be used as a method for any form of protest. This suggestion is made by me, as on this issue there is honest difference of opinion. Lawyers like Sri S. Chellaswami frankly and forcefully expressed views against boycott, whatever be the provocation.

I have unshakable faith in Almighty. He willed a Leela. The agitation of lawyers happened in Tamil Nadu. The presiding God of Tamil is Lord "Muruga". Tirupparankundram is one of His "Aaru-padai-veedus". Hence the venue of occurrence at Tirupparankundram. He laughed!* It echoed throughout Tamil Nadu. The curtain of the drama was drawn by Him on 31st March, 1979 at a time when it was Krithika the star attributed to Muruga, the announcement came that the Hon'ble Justice C. J. R. Paul, was appointed as a Commission of Inquiry.

There is some significance in my involvement also. The last case which I argued before the abstention of lawyers from Courts was before the Supreme Court in a Special Leave Petition on behalf of Sri Meenakshi-Sundareswarar Devastanam, Madurai involving title to a property in which is held a Mandagappadi in the month of Panguni for the marriage festival of Subrahmanya. He had chosen me as one of the actors in the Drama.

The entire episode is sad and unfortunate. It has left many wounds and scars. Even people who are balanced became emotional. I have myself caused wounds and scars. Wittingly or unwittingly I has caused unhappiness, in a very senior member of the Madras Bar who is a jurist whom I have always held and will continue to hold in high respect. I have caused wounds in having been critical of the learned Advocate-General, to whom I have been a very good friend for several years and whom I have held and will continue to hold in affection. I have also myself sustained wounds and still bear scars. Wittingly or unwittingly I might have displeased both sections of the Bar—those who were for abstaining from Courts and those who were not for abstaining from

7. (1976) 2 S.C.C. 521: (1976) Cri.L.J. 945: (1976) S.C.R. (Supp.) 172: A.I.R. 1976 S.C. 1207.

*திருப்பரங் குன்றத்தில் நீ சிரித்தால் முருகா! திருத்தணி மலைமீது எதிரொலிக்கும்.

Courts. The entire episode will certainly remain in the history of the Tamil Nadu Bar and will pass on to posterity and cannot be erased from history. But all of us living should make our best efforts to eradicate this unfortunate incident from our minds. To all those irrespective of their personal views whom I might have offended or displeased, I express my regret. But I have no regrets for my involvement in all the agony of this painful drama, irrespective of the views of any one. I feel happy that I was also thought of and chosen as one of the instruments (**निमित्तमात्र**) by God. Nobody need take credit or discredit for this historic and momentous agitation, Let them all realise:—

***मयैवैते निहता: पूर्वमेव निमित्तमात्रं भव सव्यसाचिन् ।**

Before I conclude I must say a few words about the Judges for the vindication of whose impartially and independence the indefinite abstentions from Courts started. That causes have not suffered an *ex parte* disposal, is the greatest tribute to all the Judges throughout the length and breadth of Tamil Nadu. They have acted with great restraint and nobility on the abiding principle. "Justice at all casts."

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* Gita, Chapter 11, verse 33.

## "MANDATORY INJUNCTION ON AN INTERLOCUTORY APPLICATION UNDER CODE OF CIVIL PROCEDURE."

*By*

*P.S. Narayana*, B.SC., M.A., B.L., *Advocate, Tirupati.*

Salmond defines mandatory injunction as "an order requiring the defendant to do some positive act for the purpose of putting an end to a wrongful state of things created by him or otherwise in fulfilment of his legal obligations, for example, an order to pull down a building which he has already created to the obstruction of the plaintiff's right" etc.[1] Section 39 of the Specific Relief Act of 1963 provides for mandatory injunctions in Indian Law. The mandatory injunction is always considered to be an exceptional remedy. Specific Relief Act of 1963 does not provide for temporary mandatory injunction or mandatory injunction on an interlocutory application except under section 37 (1) of the Act, which reads "Temporary and perpetual injunctions:(1) Temporary injunctions are such as are to continue until a specific time or until the further order of the Court and they may be granted at any stage of a suit and are regulated by the Code of Civil Procedure (V of 1908)." Though the Code of Civil Procedure is a Code of procedure only and not substantive law and cannot itself establish a right which does not exist under the ordinary law, *Macha Koundan* v. *Kottara*[2], it however deals with temporary injunctions under section 94, Order 39, rules 1 and 2 and section 151, Civil Procedure Code.

Under section 94 clause (*c*) in order to prevent the ends of justice from being defeated the Court may, if it is so prescribed "grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold". Order 39, rules 1 and 2 of the Code as amended by the Amendment Act of 1976 read as follows: "Cases in which temporary injunction may be granted".

1. Where in any suit it is proved by affidavit or otherwise.

(*a*) that any property in dispute in a suit is in danger of being wasted damaged or alienated by any party to the suit or wrongfully sold in execution of a decree; or

(*b*) that the defendant threatens or intends to remove or dispose of his property with a view to defrauding his creditors;

(*c*) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit;

the Court may by an order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit until the disposal of the suit or until further orders.

Injunction to restrain repetition or continuance of breach : 2 (1)

"2 (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of or any breach of contract, or injury of a like kind arising out of the same contract or relating to the same property or right ;

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security or otherwise, as the Court thinks fit."

Saving of inherent powers of Court :

*Section* 151.—Nothing in this Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

1. Salmond on Torts (II Edn.) pages 122 and 123.
2. (1935) 69 M.L.J. 750: 42 L.W. 866: I.L.R. 59 Mad. 202: A.I.R. 1936 Mad. 50 (52).

Now the point to be considered is whether a mandatory injunction can be granted on an interlocutory application under the provisions of the Code of Civil Procedure. None of the provisions of law referred to above speaks about the granting of temporary mandatory injunction during the pendency of a suit. Order 39, rules 1 and 2 of the Code undoubtedly empower a civil Court to grant temporary injunctions of the nature specified in them. Since specific provisions are there in the Code of Civil Procedure for granting temporary injunctions, civil Courts cannot resort to section 151 as inherent power of the Court exists only where there is no express provision of law applicable to the case, *P. Rama Rao* v. *P. Vimalakumari*[3] But however if the circumstances of the case are not covered by the provisions of Order 39 and if the Court is of opinion that the interests of justice require the issue of temporary injunction, then definitely the Court can pass such an order under section 151. (*Manohar Lal Chopra* v. *Rai Bahadur Rao*[4].)

The language of Order 39, rule 1 is wide enough to include an order in the form of a mandatory injunction upon an interlocutory application. The words "the Court may by order grant a temporary injunction or make such other order for the purpose of preventing, damaging or otherwise causing injury or loss as the Court thinks fit until the disposal of the suit or until further orders" clearly take in their fold an order in the mandatory form for doing of a particular thing. Such a power however is to be exercised in very rare cases and with due care and caution. Unless there are exceptional circumstances, the mandatory injunction would not normally be issued. It can be granted to restore the *status quo* existing on the date of the suit, *Suranna* v. *Somulu*[5]. Ordinarily a Court does not grant a mandatory injunction at an interlocutory stage but that is not because it has no jurisdiction to do so. In a proper case which must be rare, the Court certainly has jurisdiction to grant a mandatory injunction at an interlocutory stage. (*Ganapathi Reddi Rami Reddi* v. *D. Chinnappa Reddi*).[6] Once it was in doubt whether the mofussil Courts in India had power to issue mandatory injunction under Order 39, rule 1. (*Rasulkarim* v. *Pirbhai*).[7] But this view was not accepted subsequently since it was held in the affirmative that the Courts in mofussil also have power to grant such orders. Though mandatory injunction on an interlocutory application itself is a rare one, if such an order is passed, it may be granted only to restore the '*status quo*' and not to establish a new state of things differing from the state which existed at the date when the suit was instituted. (*Nandan Pictures* v. *Art Pictures*).[8] Both under Order 39, rule 2 and section 151 the Court has power to pass an order even in mandatory form if it is necessary to preserve the suit property from being destroyed or if such order is required to maintain '*status quo*' between the parties. (*Goverdhan Singh* v. *Mulkh Raj*)[9]. If a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the '*status quo*' and not granted to establish a new state of things[10]. Differing from the above view it was held that a preliminary mandatory injunction may be granted although the act complained of was fully completed before the suit or the appeal was actually filed or preferred. (*Suranna* v. *Somulu*)[11]. There is no limitation on the Court's power to grant a mandatory injunction so as to restore the *status quo* prior to the institution of the suit in an appropriate case, particularly when the *status quo ante* has been altered shortly prior to the suit and that act itself was the direct and proximate cause as a result of which the suit came to be filed) (*Ganapathi Reddi's Case*)[12].

An order of mandatory injunction directing the defendants not to give effect to a transfer order and to allow the plaintiff to work at the old place can be passed under Order 39, rule 2; hence the order is appealable under Order 43, rule 1 (*r*). (*R. K. Biswas* v. *Union of India*)[13], but however a mandatory injunction on an interlocutory application can

3. (1969) 2 An.W.R. 49: A.I.R. 1969 A.P. 216. (220); *Union of India* v. *Lalji*, A.I.R. 1969 Guj. 55 (62).
4. A.I.R. 1962 S.C. 527 (532).
5. A.I.R. 1969 A.P. 368 (369, 370).
6. (1977) 1 An.W.R. 62 (63).
7. A.I.R. 1914 Bom. 42.
8. A.I.R. 1956 Cal. 428.
9. A.I.R. 1973 J. and K. 63.
10. A.I.R. 1978 Pat. 144.
11. A.I.R. 1969 A.P. 368.
12. (1977) 1 An.W.R. 62.
13. A.I.R. 1966 Pat. 263 (265).

be granted since a civil Court has jurisdiction to order the same and since there is no error of jurisdiction in as much as the Court has power to grant such an injunction in the interest of justice under its inherent powers under section 151 and such power is not covered by Order 39. (*Shrikant Raguvir* v. *Jaidev Saunlo*[14]). Hence revision under section 115, Civil Procedure Code, alone is maintainable. However the same Court subsequently held that there is no warranty for the proposition that no mandatory injunction (directing defendant not to cause injury to plaintiff) can be granted under Order 39, rules 1 and 2, that mandatory injunction can be granted under Order 39, rule 2 and not under section 151 and an order refusing to grant such an injunction is an appealable one[15].

To conclude, it seems to be settled law that a mandatory injunction can be granted on an interlocutory application also if the circumstances warrant the passing of such an order even under Order 39, rules 1 and 2 though specifically such words are not used under the aforesaid rules. It is also well-settled that if the existing things on the date of the suit are altered subsequently, then a temporary mandatory injunction can be granted by the Civil Court to restore the original state of things as on the date of the suit which is otherwise known as restoration of "*status quo*", but if a suit for the relief of permanent injunction is filed by the plaintiff and even before the filing of the suit, the mischief was already completed by the defendant, on an interlocutory application in such cases, since there can be no preventive interim relief, can a temporary mandatory injunction be granted? There seems to be some divergence of opinion among various High Courts in our country on this aspect.

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14. A.I.R. 1975 Goa, Daman and Diu 24.
15. A.I.R. 1978 Goa, Daman and Diu 46, 47.

## SERVICE OF SUMMONS THROUGH POST.

By

S. R. VEERARAGHAVAN, M.A., B.L., *Advocate, Tiruvannamalai.*

Order 5 of the Code of Civil Procedure deals with the service of summons on the defendant. Rule 9 therein specifies the mode of delivery of summons for service. The Madras High Court has made the following amendments to the said rule 9:

"(1) Where the defendant resides in India, whether within or without the jurisdiction of the Court in which the suit is instituted, the Court may direct the proper officer to cause a summons under this order to be addressed to the defendant at the place, where he ordinarily resides or carries on business or works for gain, and sent to him by registered post pre-paid for acknowledgment.

(2) Where the summons is returned unserved or the defendant does not appear on the day fixed in the summons, the Court may direct that the summons shall be delivered or sent to the proper officer to be served by him or one of his subordinates on the defendant".

(3) and (4) ........................

Suryamoorthy, J., in *Nataraja Iyer* v. *Nacharammal*[1], observed:

"In the context in which the word 'may' is used, it has to be interpreted as "shall". The word 'may' includes 'may not' but is also capable of meaning 'must' or 'shall', depending upon the context in which it is used".

In that case, the decree was passed on 1st June, 1971. Petition to set aside the *ex parte* decree was filed on 30th December, 1972. The above quoted judgment reads:

"Assuming that a postal acknowledgment purporting to be the acknowledgment of the summons on a woman called Nacharammal, had been returned to the Court, there is nothing to show that the person Nacharammal on whom the summons was served is the defendant in this case".

It further observes:

"Obviously because the Court has no control over the postman and there is every possibility of the summons or notice being served on a wrong person with the same name, service of summons through Court again, if the defendant does not appear after the purported service of summons by post, was deemed necessary and laid down in the aforesaid rule. Where the defendant does not dispute having received the summons by post, problem would arise. But where such dispute arises, service of summons by post cannot be held to be sufficient to sustain an *ex parte* decree or *ex parte* order".

Civil Procedure Code has recently been amended by Act CIV of 1976. Rule 19-A was introduced:

"The Court shall, in addition to, and simultaneously with, the issue of summons for service in the manner provided in rules 9 to 19 (both inclusive) also direct the summons to be served by registered post, acknowledgment due, addressed to the defendant, or his agent empowered to accept the service, at the place where the defendant, or his agent actually and voluntarily resides or carries on business or personally works for gain:

Provided that nothing in this sub-rule shall require the Court to issue a summons for service by registered post, where in the circumstances of the case, the Court considers it unnecessary.

(2) When an acknowledgment purporting to be signed by the defendant or his agent is received back by the Court or the postal article containing the summons is received back by the Court with an endorsement purporting to have been made by the postal employee to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons, when tendered to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, prepaid and duly sent by registered post, acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received

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1. (1977) 1 M.L.J. 47, 49: 89 L.W. 609: A.I.R. 1977 Mad. 221.

by the Court within thirty days from the date of the issue of the summons."

In this context, it will be worthwhile to refer to the new proviso added to Order 9, rule 13:

"Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim."

So, as on today, the High Court amendment to Order 5, rule 9 has become "motionless and stagnant." But the observations of Justice Suryamoorthy pertaining to postal service, quoted *supra*, still hold good. A division bench of the Patna High Court, in *Baidyanath Prasad Sinha* v. *State*[1], held:

"It is not at all difficult to obtain postal seal marks on post-cards with wrong dates.

Action of the prosecution in tendering blank post-cards with different postal seal marks of different places in order to show that such marks could be easily obtained deserves disapprobation." (*Head note.*)

Thus the High Court amendment is to be deemed to be a safety valve and hence it may be revived by suitably worded amendments so as to help the litigant public.

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1. 1961 1 Crl.L.J. 544.

## PRESIDENTIAL ADDRESS BY JUSTICE M. M. ISMAIL ON THE OCCASION OF THE INAUGURATION OF THE SUB-COURT AT NAMAKKAL BY THE CHIEF JUSTICE THIRU T. RAMAPRASADA RAO ON 4TH MARCH, 1979.

The Hon'ble the Chief Justice, the Hon'ble Minister for Revenue, the Hon'ble Thiru Justice Sathiadev, the District Collector, the District Superintendent of Police, the District Judge in charge, the Judicial Officers of the District, Mr. R. Rajagopalan, who is taking over as Subordinate Judge of this new Court, President and members of the Namakkal Bar Association, other members of the Bar who have come from other places, ladies and gentlemen:

It gives me great pleasure to preside over this pleasant function which has been made memorable from many points of view. From my point of view, there is an element of personal fulfilment also. It was more than three years ago, on 28th October, 1975, I mooted out the idea of establishing a Sub-Court at Namakkal. The Chief Justice of the High Court approved of my proposal in November, 1975 and the same was sent to the Government in November, 1975 itself. Subsequently the proposal to establish a District Munsif's Court at Rasipuram was also taken up and in 1976 the same was sent to the Government. On 6th December, 1978, nearly three years thereafter, the Government passed orders establishing this Court and that is how this Court is being now inaugurated.

I am not new either to this place or to the audience, but the occasion is new. The occasion is not only new, but also significant, not merely from the point of view of the members of the Bar hailing from Namakkal, but also from the point of view of the public of the area. These are days when we talk of decentralisation, that is, taking the facilities available to the public to nearer home and to their door. When we are thinking of such decentralisation, with reference to the judiciary there is one fundamental aspect which has to be very seriously considered, namely, whether a Court in a particular place will be able to maintain and sustain itself. I learn that as far as Salem District is concerned, this area happens to be fertile and productive with reference to varied articles and the separation of this part from Salem may cause some heart-burn to some people. However, if careful thought is given to this matter, it will become clear that the administration of justice is one of the basic political and social duties of any civilised Government, and, therefore, the only consideration that should motivate its decision to establish a Court in a particular place should be to what extent it will be to the benefit and advantage of the litigant public, all other considerations becoming relatively subsidiary. The only other consideration which may have an overriding effect from the point of view of the Government is the finance. Thus, subject to the availability of finance, to establish a Court in order to cater to the needs of the litigant public is the fundamental obligation of any Government. But we cannot fail to take note of the fact that the establishment of a Court is a costly affair. It is not only a question of incurring a lump sum expenditure in the form of putting up constructions, but also incurring a recurring expenditure on the establishment in the running of a Court.

Nowadays people are more conscious of their rights and their resort to Court is more frequent. I am sure that most of the members of the Bar are familiar with clients approaching them bringing to their notice a decision of the High Court already rendered on a point, which has been reported in the newspapers. This in a way places the members of the Bar at a disadvantageous position because a litigant no longer waits for the advice of a member of the Bar. On the other hand, he is in a position to give a lead to the members of the Bar, in view of the widespread reporting of the decisions of the Courts in all newspapers. In such a context, the job of a member of the Bar becomes very difficult, since no longer he is in a position to have complete control over his client. To the extent to which members of the Bar, even under such circumstances, are able to resist being led by their clients, it will constitute a glory of their professional independence and nobility. These general observations will in no way lessen the happiness which all of us feel about the establishment of a Sub-Court in this place. I learn that lands yielding highest rate of land revenue are said to be

situate in a village near about here, namely, Pandamangalam. That may be an indication of the fertility and productivity of the soil and consequently the capacity of the people to pay.

On this happy occasion, I would like to make a few more general observations. This audience is a mixed one consisting of the members of the public as well as the members of the judiciary and members of the Bar. Each element of this audience owes a certain duty. But there is a common feature underlying all the sections, namely, a sense of fairness, a sense of justice and a sense of fair-dealing. These attributes are not peculiar to judicial administration. Every one of us in some field or other, in some area or other, has to be fair, has to be just and has to have a fair-dealing with others. As an illustration, in your house, when a dispute arises between your mother and your wife, you have to be fair as between them; when a dispute arises between your own children, you have to be fair between them; and when a dispute arises between two servants of yours, you have to be fair between them. Consequently the display and observance of the sense of fairness is so common and basic to our every day life and the sense of fairness, justice and fair-play in the administration and justice is merely an extension of this ordinary normal feature which we are bound to observe every day in every sphere of our activity. Ultimately the confidence of the public, which has to be ensured and sustained, depends upon the objectivity which you bring to bear upon the controversy that is brought before you and the reputation which you build up for being impartial and just. Once this reputation is impaired and your integrity is questioned, very little can survive in the field of administration of justice. This display of the sense of fairness, justice and objectivity is a duty cast not only on the members of the Bar or the judiciary but also on the members of the public. When a litigant comes to Court and approaches an Advocate in the process, he should not come forward with a feeling that somehow or other he must get an interim order or win the case. A litigant may feel that he has got a good case and a just cause worth fighting for and with that feeling he may approach the Advocate and the Court to vindicate his right as against the person who tries to deprive him of the right or interfere with his enjoyment thereof. But in his anxiety to vindicate his right, he should not feel that by hook or crook he must win the case but he must rely exclusively on the strength of justice of his case and he ought not to tempt his Advocate, when he approaches, to resort to deeds unworthy of his profession, so that he may win the case. Very often it happens that a litigant himself has no faith in his case, but he approaches a counsel and the Court merely for the purpose of obtaining an interim order which will give him the satisfaction of having harmed his adversary by way of wreaking vengeance on him or by way of establishing his prestige in a dispute between him and his adversary. Many of the members of the Bar would have experienced that once they have succeeded in obtaining an interim order in their favour, the clients do not come to them later until the other side comes forward with a petition to vacate the interim order. It will be the duty of the counsel as well as the clients, in such circumstances, to vindicate the majesty of the law and the purity of the judicial process without resorting to any means unworthy of this feature of the judicial administration. The general public and in particular the litigant public should take a vow that whatever may happen, they would not abuse the process of the Court and that they would rely for their success in the litigation only on the justice of the cause and they would never tempt their counsel to do anything destructive of the nobility and the dignity of the profession to which they happen to belong. Just now it was stated that this place Namakkal is known for its temples and in particular Anjaneyar temple was mentioned. All of us know how learned, how noble, how great and how strict Anjaneya is and when you take pride in the presence of such Anjaneya temple, it behoves you to take a vow in the presence of such a deity that whatever happens, you will not swerve from the path of truth or uprightness or from the cause of justice. If that ' the attitude on the part of every member of the public, there can be no doubt whatever that we will be having a clean administration of justice, since the very basic temptation capable of fouling the atmosphere will not be present.

Coming from the litigants to the members of the Bar, the members of the Bar are on a higher position. They occupy not only a higher position but a privileged position too. They are educated, not simply educated, but holders of double degrees. Therefore their obligations become all the greater. Any deviation on the part of a litigant may be excused, but no such deviation can be excused on the part of a counsel. The deviation on the part of a litigant may be the result of his anxiety or obsession that he must vindicate his rights. On the other hand, there can be no such anxiety or obsession on the part of a counsel. The nobility of the profession and the learned character thereof demands from the members of the Bar that they must resist any temptation that may be offered by their clients and they must tell them firmly that the Bar will do only those things which are permissible in law and will not abuse its privileged position. Such determined attitude on the part of the Bar is far more important in the present context of overcrowding in the profession, which leads to under-cutting, unhealthy competition and over-reaching. Such evils of overcrowding are not peculiar to the legal profession alone. However, if a stubborn attempt is not made to eradicate such evils springing from overcrowding, the entire judicial administration will be brought to disgrace. For a temporary advantage of getting an interim order and for a doubtful advantage of succeeding in a case, if a lawyer resorts to methods which are not permissible in law and which are not consistent with the professional ethics, he brings not only his profession into ridicule and contempt, but also the entire judicial administration into disgrace. Once the judicial administration or the judiciary is brought into disrepute, there can be no gainsaying the fact that that will be the end of all civilisation, since the judiciary is the one organ that stands between chaos and havoc on the one hand and peace and culture on the other. I am not mentioning this simply because I happen to belong to the judiciary just now, but I am speaking on behalf of the institution of the judiciary as such. While so speaking, I can emphasise with all the sincerity and conviction I am capable of that so long as the judiciary remains unimpaired, its reputation unsullied and its character unimpeached by any person, that will constitute the greatest bulwark against abuse of powers on the part of the other organs of the State and will also constitute the highest and the noblest achievement of any civilised society. In the maintenance of the highest traditions of the judicial administration the co-operation of several persons is involved, namely, the litigant public, lawyers and presiding officers. The law of the land imposes on every one of them some obligation and the traditions and the ideals of this country reinforce them. The profession of a lawyer is not only learned and noble but also an idealistic one. If we just look back into the history, we notice that several leading lawyers had been in the vanguard of the Independence Movement of this country and Movement of Social Reformation. Many members of the Bar, when they were at the zenith of their profession, left everything and joined the Indian National Movement, and some of them took to spiritual path and joined one Ashram or the other. I am mentioning this for the purpose of emphasising that success in the profession, as ordinarily understood, cannot be the ultimate end of every one. It is worthwhile carrying on the profession only so long as one is able to carry on the same with dignity, decency and commanding the respect of everybody. Once this becomes impossible, you can as well throw away the profession and seek some other avenues. This is so far as the members of the Bar are concerned.

Then I come to the Presiding Officers of the Court. That a Presiding Officer of a Court has to maintain a degree of dignity and decency capable of commanding awe and respect of all those who approach the judiciary goes without saying. However, in addition to this, a Judicial Officer has to pay a price which no member of any other service is called upon to pay, namely, maintenance of certain degree of aloofness. Once this degree of aloofness is not maintained the door to all sorts of accusations is open. However, consistent with the dignity and the duties of the office, this aloofness can be practised without giving an impression to anyone that the Presiding Officer is closer to a particular section of the people or an individual. So long as an officer moves with everybody or

keeps at a distance from every one, there may not be much scope for criticism. Only when he gives an impression that he is closer to an individual or one section, the trouble starts. It is not unusual for the High Court to receive from members of the Bar complaints against Presiding Officers of Courts and requesting the Court to transfer a particular officer from that place. Undoubtedly the High Court gives weight to the representations of the Bar, but before acceding to their request the High Court has to consider the complaints very carefully. There had been instances where a particular section of the Bar in a particular place had claimed that it had been responsible for having a particular officer transferred from that place and if that impression is created, the atmosphere may be such that the succeeding judicial officer feels afraid of that section of the Bar and certainly that is not desirable. That is the reason why it must be understood that if any person complains against the conduct of a judicial officer, such a person should not indulge in such complaints lightly without having adequate and sufficient materials on the basis of which the allegations can be established. If really a Judicial Officer is bad, the solution is not to transfer him because the transfer of such an officer will only mean transfer of badness from one place to another. There are innumerable persons who are prepared to complain against a Judicial Officer on vague and unsustainable grounds, but many are not willing to come forward with specific instances or definite materials. When one thinks of complaining against a Judicial Officer, he must remember that the function of a Judicial Officer is a most strenuous one, whether he is a Second Class Judicial Magistrate or a Judge of the highest Court in the country. The strain to which a Judicial Officer is subjected in the discharge of his duties is something for which there is no comparison in any other service. Once a Judicial Officer has undertaken that obligation. nothing should deter him from discharging that obligation with faith in himself and in his office and without fear of any one. In view of this character of judicial function, the judiciary is entitled to expect not only the co-operation from others and in particular the members of the Bar, but also their sympathy and understanding. So long as the judiciary is fearless, strong and independent, the society will be peaceful and cohesive and the Government will be responsive and responsible and once the independence of judiciary is impaired or the integrity of the officer presiding over a Court is affected, naturally the judiciary will lose its strength as well as utility which will ultimately affect the existence of the social system itself.

Just now I shall say a few words to the junior members of the Bar. In view of the overcrowding in the profession the junior members may not find sufficient work in the beginning. However that is the period during which they can equip themselves usefully without wasting their time by going here and there and doing this and that. So long as they happen to belong to the profession and they have an intention of continuing in the profession, they have to spend every minute of theirs in equipping themselves for thriving in the profession. It is well-known that the law is a zealous mistress, whether the person concerned is a lawyer or a Judge. So long as that person does not occupy himself with anything worthwhile, he becomes lazy and his mind becomes vacant and being young he is likely to be carried away by emotions. On the other hand, if he makes up his mind to be pre-occupied with something or other, in the instant case, with reading of the law reports and text-books, not only he will have no scope for indulging in any other undesirable and unprofitable activity but also he will positively gain by equipping himself fully to achieve success in the profession. The equipment does not consist in merely sitting in a place and reading books. It spreads to the extent of going to the Court and watching the performance of acknowledged leaders and how the minds of the Bench and the Bar react to each other in an attempt to find out the truth in a particular case. It is unfortunate, in this context, that apprenticeship had been abolished, thereby removing the obligation on the law students to get themselves acquainted with the practical aspects of the profession before they themselves join the profession.

I would like to say a few words with regard to seniors also. They must trust their juniors. It is not as if all the juniors are incompetent. You can find out whether a

junior is capable of coming up or not, only by entrusting him with responsibility. There is thus absolutely nothing wrong in a senior, having given necessary instructions to his junior, allowing him to do a case in the Court, himself sitting by his side to see that nothing goes wrong. If this attittude is not adopted, the profession will naturally disintegrate and the juniors not finding the profession worthwhile and at the same time without getting away from the profession, may become an instrument to destroy the good name of the profession.

There is only one other aspect which I would like to touch upon before I conclude. All of us are aware that there is one particular view that lawyers as a class constitute social parasites inasmuch as their work is not productive and they are responsible for generation of controversies between the parties. However there is another aspect of the legal profession which has to be prominently brought to the notice of the general public. Just as a doctor's role is not merely curative but also preventive, a lawyer has a dual role. Undoubtedly when a dispute arises between two parties, each one engages a lawyer and the services of lawyers are available to the respective clients. The lawyers also can play a preventive as well as a prophylactic role. It is certainly open to them to advise their clients in such a manner as to avoid a dispute, and, even if a dispute has arisen, to see that the dispute is settled to the satisfaction of the parties. Such settlement will be far more useful than a success in the litigation. When a case is fought very hotly, the result will always leave a trail of bitterness as between the successful party and the party who has lost. On the other hand, a settlement of dispute avoids this result. The result of a settlement, even if both the parties gained only a portion of what they claimed or thought that they would be entitled to, will be worthwhile, in view of the fact that no bitterness will be left, and the result is achieved as a consequence of agreement betwen the parties and without undergoing the agony of a prolonged and protracted litigation. I am very eager to impress on every one of you that this will not cause any loss to the profession and, on the other hand, this will make the profession an useful organ of the society producing positive results rather than playing only a negative rôle. In fact, in such circumstances, a client may be eternally grateful to his counsel for avoiding a disaster and preventing a complete ruin and enabling both sides to lead an honourable life.

I have taken much of your time and I wish every one of the members of the Bar prosperity coupled with dignity, prosperity which comes out of sincere, earnest, honest and good work, prosperity which in turn generates succession of lawyers of capacity and dignity. I wish the members of the public in the area also success and peace. I am sure the sub-Court in this place which the Honourable the Chief Justice, as Head of the Judiciary in the State, has been kind enough to inaugurate, will function really as a temple of justice inspiring confidence in every one who approaches it and comes anywhere near it.

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## "COMMISSION AND OMISSION".

*By*

PULAVAR G. DEVARAJ, B.SC., B.L., *Advocate, Tiruppattur.*

According to Mr. Francis Lynde Stetson, "A man could be of greater service to his country and his race, in the forefront ranks of the Bar than anywhere else". I being an advocate conscious of my fundamental duties towards Country, Community, Client, Court and Colleagues would like to point out certain flaws found in the Tamil Nadu Act XL of 1978 for proper appreciation and prompt remedy by the concerned authority.

According to C. T. Holmes, "Law is a mirror of the progressive life". Promissory note being a negotiable instrument as per the Negotiable Instruments Act (XXVI of 1881), was made non-negotiable from 16th January, 1975 to 15th July, 1978 in Tamil Nadu by the Debt Relief Acts and justice was delayed by staying the suits pending at that time by the said Acts during the said period of three and half years. We remember the oft-quoted maxim, "Justice delayed is justice denied". Then, the Tamil Nadu Act XL of 1978 liquidates 'debt' not exceeding Rs. 500-00 payable by 'debtors' on or before 14th July, 1978. The promises made by 'debtors' under negotiable instrument (Promissory note), have been made meaningless and non-sense, it is a misnomer to call it a promissory note or a negotiable instrument in Tamil Nadu. The emblem of the Tamil Nadu of Government bearing the inscription "வாய்மையே வெல்லும்" has become a mockery.

Courts are regarded as Temples of Justice in democratic Governments and they should not be converted into the institutions of the Government for collection of revenue. The object and reasons of the provisions regarding refund of Court fees in enacting the Tamil Nadu Act, XIV of 1955, have been lost sight of while bringing the Tamil Nadu Act XL of 1978. A poor creditor who filed a suit on the foot of a promissory note against a 'debtor' on 14th January, 1975 for a principal amount of Rs. 500-00 and interest, is not only denied justice but also deprived of his Court-fee rightly paid into Court for seeking justice. When there is no service nor any justice rendered by Court to the pathetic plaintiff, I am not able to understand, whether the forfeiture of the Court-fee is justifiable or justiciable in a Court of law or at least in accordance with the principles of natural justice. Would it not be proper if at least provision for refund of Court-fee paid legally and rightly is made in order to maintain Justice?

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## A SUGGESTION FOR PROVISION IN THE CIVIL PROCEDURE CODE.

*By*

T. K. S. SHARMA, *Advocate, Tindivanam.*

The recent unfortunate incident that took place in Tiruparankunram Police Station, in which an Advocate (of civil side?) was involved, shows how imperative the need is, to make a provision in the Civil Procedure Code, enabling civil Courts granting injunctions, attachments etc., or issuing commission, Receiver or Delivery warrant's and such other processes, to send at the cost of the party, a copy of the order to the Police Officer having jurisdiction over the place, and a direction that the said Police Officer shall be bound to give due protection to the party in whose favour the order has been issued or to the Officer, of the Court executing the process, or both, as the case may be.

Will our High Court Act quickly and set a lead in the matter to other High Courts ?

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## SPEECH DELIVERED BY THIRU K. NARAYANASWAMI MUDALIAR, MINISTER FOR LAW, GOVERNMENT OF TAMIL NADU AT THE INAUGURAL FUNCTION OF THE "REFRESHER" COURSE OF TRAINING FOR JUDICIAL OFFICERS, ON 14TH APRIL, 1979.

The Hon'ble Chief Justice, the Hon'ble Judges and Judicial Officers,

I am beholden to the Hon'ble Chief Justice of the Madras High Court for according me the privilege of presiding over the inaugural function of the Refresher Course of Training for the Judicial Officers of the State. The need for arranging Refresher. Courses and imparting judicial instruction, advice and knowledge cannot be gainsaid. In my view, it is absolutely necessary to keep our judicial intellect in a fine form and fettle. Last year I addressed the Judicial Officers and suggested some details of training in skeletal and general outline. Your Chief Justice endowed with rich experience would certainly chalk out courses of proper training and formulate subjects of legal interest appropriate to each class of Judicial Officers. I am convinced of one stubborn fact; the more a Judge studies law text-books, erudite commentaries, Appeal Cases of England, Supreme Court Judgments etc., the more efficient a Judicial Officer becomes; such experience is added to his ability and learning. A Judge must develop his capacity to be neutral. Impartiality is thought of as part of a wider, judicial neutrality. Judges are seen essentially as arbiters in conflicts—whether between individuals or between individuals and the State. The judiciary is the neutral force between the Government and individuals in showing its independence. It should not imagine that it should necessarily strike the posture of anti-Government in order to show its independence. The Judge interprets, applies laws without favour to either and its application in a particular case is embodied in an order which is passed to the executive to enforce. It is not the Judge's personal order; it is substantially the product of the law and only marginally of the judicial mind. If its enforcement is resisted or evaded, the Judge is no more concerned than if he were an arbitrator.



A British writer describes the judiciary as more than "neutral arbitral force".

In the recent Cochin conference of All India Law Seminar Mr. Justice Chandrachud while participating in the discussion on the "Role of Lawyers and Courts in the socio-economic transformation of the country" and "the reorganisation of the legal system" made many valuable suggestions for dissolution of the backlog and arrears of cases which have been mounting in recent years inspite of increase in the number of Judges from time to time. The Additional Solicitor-General of India, like Justice Khanna, observed that mere increase in the number of Judges would not result in speedy disposal of cases.

A Government of a country does rest on law, liberty, representative Government and an impartial administration of justice. We are mainly concerned with justice. Law represents the system of rules to be applied to the settlement of disputes between individuals and Government, or between individuals and individuals. Justice is the means of ensuring that the rules are applied correctly and impartially. It is the business of representative Government, executive and legislative, to formulate new rules or to maintain old ones. But it is the business of the Courts to see that they are applied properly to existing disputes when they arise. This obviously involves an independent judiciary, a fair

procedure and a reasonable access to the Courts on matters which are properly justiciable.

When I entered the Bar 41 years ago, direct attacks on the judiciary were unknown. Nearly ten years back, such direct attacks on the Indian judiciary assumed fairly disturbing dimension. Today, direct and indirect, overt and covert attacks on the judiciary are now constantly being made by back-benchers, publicists and politicians of all hues and colours.

Lord Hailsham says trat indirect and side references to them are habitually promoted from behind the ramparts of a few academic institutions, and even on the radio and television. These animadversions naturally provoke popular manifestations of hysteria whenever judicial decisions prove unpopular or are thought too lenient or too severe.

Undeterred by such an increase in the volume of criticism, the judiciary has got to function without bias or partiality.

I trust your Refresher Course will sharpen your wits, increase your knowledge and fortify your spirit of judicial authority and neutrality.

I wish the function all success.

## AN ILL-CONCEIVED LEGISLATION.

*By*

S. GOVINDARAJAN, B.SC., B.L., *Advocate and Government Pleader, Chidambaram.*

When the dark clouds of emergency were hovering over the entire country and civil liberties were throttled a very hasty, ill-drafted and ill-conceived legislation was enacted, namely, "The Tamil Nadu Debt Relief Act, (President's Act XXXI of 1976)".

As the preamble reads, the Act professes to provide relief from indebtedness to landless agricultural labourers, rural artisans and small farmers in the State of Tamil Nadu.

The statement of reasons makes interesting reading:

The Government of Tamil Nadu propose to implement liquidation of rural indebtedness in stages by imposing a moratorium on recovery of dues from landless labourers, small farmers and marginal farmers and rural artisans and by undertaking legislation for such liquidation before the expiry of the period of moratorium........ The Government of Tamil Nadu have now decided to give permanent relief by way of liquidation of debts to the weaker sections of the ***rural community*** who are connected with agricultural production which is vital for the economic well-being of the nation;.........

"The Bill seeks to achieve the above objects".

The Act consists of 15 sections. Section 3 is the definition section. We are told that wood-cutter is not an 'agricultural labourer'; taxes due to Government and local authority are not 'debt'; 'family' will not include the major and income earning sons; a person who does manual labour on agricultural land for his principal means of livelihood and whose annual household income does not exceed Rs. 2,400 is an agricultural labourer; a non-resident of Madras City or Municipal Towns having as his principal means of livelihood production or repair of traditional tools, implements and other articles used for agriculture or process any craft and gets an annual income of less than Rs. 2,400 is a rural artisan; a person who holds for his livelihood as tenant or owner less than 2 units of land in the case of scheduled tribes and one unit of land in the case of others is a small farmer and that 2 hectares of irrigated land or 1 hectare of land having facility for growing any irrigated crop or half hectare of plantation crop etc., or quarter hectare of land having facility for more than one irrigated crop is a unit of land.

Under section 4 the debts payable by the debtors under the Act are statutorily wiped out. Section 5 provides for statements to be provided by certain categories of creditors. Under section 6 mortgagor-debtors can apply to the Tahsildar for relief from indebtedness. Section 7 provides for finality of orders of Tahsildar, subject to appeal under section 8 and, in harmony with the spirit of emergency, legal practitioners were prohibited from appearance as per section 9. Sections 10 and 11 provided for offences and penalties. Section 12 cast the burden of proof on the creditor to show that a debtor is not entitled to the benefits of the Act. Under section 13 the usual exception in favour of decrees due to Government, local bodies and banks was incorporated.

A perusal of the entire Act will reveal that a more draconian and expropriatory legislation has never been passed.

There can be no doubt that 'debt' due to a person is as much property as any tangible or intangible property.

While the Act in its statement of reasons stated that the object of the legislation was to liquidate rural indebtedness, yet in the body of the legislation there was no such specific provision to indicate that the provisions of the Act were made applicable to rural inhabitant-debtors. Persons residing in cities and towns can also claim benefits under the Act.

In the other enactments like Tamil Nadu Act IV of 1938, as amended by Act VIII of 1973, Acts X and XLVIII of 1978 and Acts XV and XVI of 1976, persons who are income-tax, sales-tax, property tax or profession tax assessees cannot claim any benefits under the Act.

Unfortunately in this Act there is no such provision. A person may be owning several houses and assessed to property tax or profession tax. But if he owns less than one unit of land, he can claim benefits under the Act.

Similarly a debtor may be having one or two major sons living with him and who are earning members. Yet he can claim benefits under the Act.

A wood-cutter is not a landless agricultural labourer under this Act and it is doubtful whether a carpenter, mason or goldsmith are rural artisans.

In the case of unit of land the emphasis appears to be on irrigation facility for the number of crops raised and not on the revenue classification as wet, dry or garden land, which *ex facie* is absurd and confusing. Even the ceiling limit of one unit and its definition to contain 2 hectares or one hectare or half hectare or quarter hectare respectively appears to be arbitrary, artificial and illegal.

Further the poor creditor is ruined and destroyed. Even if he is a landless agricultural labourer rural artisan or small farmer or a poor widow if he or she had committed the sin of advancing any amount to any of his brethren of the categories referred to above, he or she is doomed.

Normally a person who claims benefits under an enactment must initially prove that he is entitled to the benefits. Even this salutary principle is given the go-by.

The right of representation by counsel which is an important right recognised on the principles of natural justice is denied.

The entire legislation is discriminatory, the benefits being extended only to a particular section of the public, the classification being arbitrary and unjust.

By one stroke of pen, the entire rural credit system is destroyed. In spite of all slogans and demonstrations no bank will advance any loan to any of these persons without proper security. Formerly, they could approach their neighbours or friends in times of need at any time of day or night. Now they cannot hope to get even a single pie.

The creditor has the right to hold and acquire property as guaranteed by the constitution and by this ex-propriatory legislation the entire property is taken away without any compensation whatever. In the latest decision of Ramaprasada Rao, CJ. and Ramanujam, J., in the case of *Sarojini Ammal* v. *State of Tamil Nadu*[1], their Lordships have upheld the constitutional validity of Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act (XXI of 1972) merely on the ground that there is no automatic discharge of the earlier arrears of rent due by the tenants. An option is given to pay a portion of the arrears within a specified time and if they exercise the option, the previous arrears are discharged. Applying the principles laid down in this and many other decisions, it will be clear that the Act is expropriatory, illegal and *ultra vires*. The avowed principles are merely a fraud on power and fraud on the constitutional guarantees.

After the enactment of the recent Tamil Nadu Debt Relief Act XL of 1978, which provides relief for all sections of debtors including the categories covered by Act XXXI of 1976, one would expect the repeal of this obnoxious legislation. Curiously the enactment is not only not repealed but the relief is claimable both under Act XL of 1978 and Act XXXI of 1976.

It is therefore high time that the Government of Tamil Nadu repealed this ill-drafted and ill-conceived draconian legislation at once with retrospective effect.

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## SHOULD SECOND APPEALS AND CIVIL REVISION PETITIONS BE ABOLISHED?

*By*

K. Parasaran, *Advocate, Madras*.

With due respect to the Chief Justice of India, his suggestion for the abolition of Second Appeals, Civil Revisions and Criminal Revisions requires re-consideration. The Chief Justice is also reported to have suggested that Article 136 of the Constitution should be suitably amended to exclude petitions for Special Leave in all cases except against decisions rendered by the High Courts under Article 226 of the Constitution.

The following legal position will make it clear that the reasoning of the Chief Justice is inconsistent. Second Appeals and Revisions are entertained only on questions of law and|or jurisdiction. The principle underlying Second Appeals and Revisions is therefore to see that all subordinate Courts function within the bounds of law and within jurisdiction. The jurisdiction under Article 226 of the Constitution is intended to keep all authorities, statutory, administrative, quasi-judicial, Governmental etc., within bounds of law. The underlying principle is that a superior Court should restrain subordinate Courts and the other authorities referred to above from usurping jurisdiction or committing illegalities. Second Appeals and Revisions therefore serve the same purpose as writ petitions under Article 226 of the Constitution, with this difference that while Second Appeals and Revisions are directed against the subordinate Courts, writ petitions are directed against authorities which are not subordinate Courts. If, therefore, for the purpose of liquidating arrears, Second Appeals and Revisions are to be abolished and Article 136 of the Constitution has to be amended to exclude appeals by Special Leave against all other matters except against orders under Article 226 of the Constitution, logically it must follow that Special Leave petitions against orders under Article 226 of the Constitution should also be excluded. This will only result in the reinforcement of the view expressed by Mr. Easwara Iyer, as reported in a section of the Press that "if the second appeals could be abolished, why not the Supreme Court itself be abolished".

This apart, there are many Central Laws and enactments which are applicable to all the States in the Union of India. Conflicting decisions may be rendered by various High Courts. In such an event, if an appeal to the Supreme Court is excluded, the same Central Law may be differently interpreted and applied in different High Courts, though that was not the intention of Parliament. Instances can be given of such situations, but one striking example is the construction of section 14 of the Hindu Succession Act, in respect of which various High Courts had given "divergent" views and the Supreme Court itself has had occasion to go back on its earlier view.

It is painful to see a suggestion coming from the apex of the Judiciary to the Legislature to curtail the jurisdiction of Courts. High Courts and, in particular, the Supreme Court which is the apex of the Judiciary of India should have unlimited jurisdiction. This jurisdiction should never be whittled down. But the Supreme Court in the exercise of its unlimited jurisdiction, may impose on itself fetters on sound judicial principles as it has been hitherto doing in interfering under Article 136 of the Constitution.

There has been enormous increase in the population. There has been enormous increase in statutory provisions. Litigation is therefore bound to increase. The remedy for liquidating arrears is not in the abolition of Second Appeals and Revisions. The most precious thing which now exists is the hope of every litigant that he has the safeguard of an ultimate chance of moving the Supreme Court by Special Leave. It would be disastrous to shatter that "hope" of the litigant. The remedy for liquidating arrears in Courts is not in the abolition of Second Appeals and Revisions, but lies elsewhere.

## NOTE ON SETH KHIARAM KRUSHIRAM v. BALAJI SINGH, (1977) 90 L.W. 572; with reference to the article in (1978) 2 M.L.J. (Journal) p. 22.

*By*

S. GOVINDARAJAN, B.SC., B.L., *Advocate and Government Pleader, Chidambaram.*

The decision referred to above has been correctly decided and does not require any reconsideration.

Reliefs to agriculturists and non-agriculturists was sought to be provided as a temporary measure by the Tamil Nadu Government. First two Ordinances were passed and later regular enactments were passed. The key to the whole problem lies in the Explanatory Statements:

"There has been wide-spread drought in the State and the agriculturists *have borrowed* debts in order to tide over the crisis caused by the failure of crops. It is in the interests of the general public that at the present time the agriculturists should be spared the distraction and expenditure involved in litigation launched by creditors and be enabled to rehabilitate themselves in order that maximum possible advantage may result to the State in the matter of production of food crops. It has therefore been considered necessary to provide that no suit for the recovery of a debt shall be instituted and no application for the execution of a decree for payment of money passed in any such suit shall be made against any agriculturists in any civil Court before the expiry of a year from the commencement of the Ordinance and all further proceedings in suits and applications of the nature mentioned above, shall stand stayed till then. This Ordinance seeks to achieve the above object". —Explanatory Statement for Tamil Nadu Indebted Agriculturists Temporary Relief Ordinance.

"By the Tamil Nadu Indebted Agriculturists Temporary Relief Act (X of 1975), suits for recovery of debts due from agriculturists and application for execution of decrees for money passed in any such suits have been stayed for the period upto the 15th January, 1976. In the prevailing economic conditions it is considered necessary that similar relief should be granted to indebted persons who are non-agriculturists not being persons who have been assessed to income-tax or sales-tax for the financial years ending 31st March, 1974 and 31st March, 1975 or assessed to property tax or house-tax in all the four years immediately preceding 1st April, 1975 for an annual rental value of not less than Rs. 2,400 (Rupees two thousand four hundred).

The Ordinance seeks to give effect to the above proposal".—Explanatory Statement for Tamil Nadu Indebted Persons Temporary Relief Ordinance.

The Acts replacing the Ordinances and the subsequent enactments extending the period have been passed with the same object in view, *viz.*, to provide temporary relief of agriculturists and non-agriculturists who had borrowed money and are debtors on the date of coming into force of the Ordinance so that they can rehabilitate themselves.

Neither the scope of sections 3 and 4 nor the definition of the debt in any way affect the issue. The words 'any liability' in the definition of "debt" qualify only any liability 'in cash or kind' and do not disclose "any liability incurred at any point of time". Similarly the words "debt is due" can only signify "debt due" as on the date of coming into force of the Ordinance. There is no necessity to specifically exclude debts contracted after the commencement as it is redundant. The Ordinances and their explanatory statements make it clear that they have been enacted only for persons who are indebted as on these dates to grant them relief and rehabilitation. Any other strained construction will be only defeating the object of the Legislature in making these enactments.

In this connection, it will be worthwhile to refer to two Full Bench decisions of our High Court on the scope of section 13 of Madras Act IV of 1938. In *S. M. Tharanganar* v. *Sankara Pandia Mudaliar*[1], S. Ramachandra Iyer, J., delivering the judgment on behalf of the Full Bench said that the words 'any debt' should in the context be taken to refer only to "subsisting debt". In *Chellammal* v. *Abdul Gaffoor Saheb*[2],

1. (195?) 2 M.L.J. 222.
2. (1961) 2 M.L.J. 222 : I.L.R. (1961) Mad. 1061 : 74 L.W. 556 : A.I.R. 1962 Mad. 1.

Srinivasan, J., delivering the judgment on behalf of the Full Bench says "it seems to us that the "interest due" means interest still remaining payable by the debtor and cannot be equated to interest both paid and still remains to be paid".

The Explanatory Statements and the decision of our High Court all point to the conclusion that the two enactments intended for agriculturists and non-agriculturists confer benefits only for persons who are indebted as on the date of coming into force of the Ordinances or in other words they relate only to debts contracted prior to the coming into force of the Ordinances and not to debts contracted thereafter.

The decision therefore does not, in my view, require any reconsiderations at all.

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## PUNCTUATION MARKS AND INTERPRETATION OF STATUTES

*By*

S. R. VEERARAGHAVAN, *Advocate, Tiruvannamalai.*

Punctuations are to help the readers to find out the true intention of the writer or the Legislature. For instance, a small comma can do havoc in the following sentence, "HANG HIM NOT LET HIM GO". If the comma is put after 'not', the sentence will be, "Hang him not, let him go". If it is put before 'not', then the meaning will become entirely different as the sentence will be read, "Hang him, not let him go". So the importance of the punctuation marks.

As to the value given to punctuation marks while construing a statutory provision, a Division Bench of our High Court, in *Panthanam Ammal and others* v. *Srinivasa Ayyangar & Sons*[1], held:

"All the text-book writers are of the unanimous view that a punctuation mark cannot have a controlling effect in the construction of a statutory provision though it may be of some assistance in the case of ambiguity. So long as the language is clear and the purport of the statutory provision is unambiguous, the absence or presence of a punctuation mark cannot have the effect of distorting the statutory provision".

The decisions reported in *Aswini Kumar Ghose* v. *Arabinda*[2], *Dr. N. Natesan* v. *Mrs. Santhalakshmi*[3], to quote a few, were relied upon in that decision and the Division Bench approved the view of Justice Balasubrahmanyan in *A. Annamalai* v. *Saraswati Ammal*[4] in preference to the view of Justice N. S. Ramaswami in *Ramakrishnan* v. *Kandaswami Thevar*[5]. In *A. Annamalai* v. *Saraswati Ammal*[4], at para. 10 it was observed:

"It seems to me that no significance should be attached to the absence of a comma after the words, 'or on the application of the decree-holder'. To construe Acts according to the absence of punctuation marks, would be to construe legislative enactment, not according to the intention of the Legislature, but according to the intention of the statutory draftsman ........I conceive that what the Legislature passes in its reading of the Bills are sections and other provisions; it does not pass punctuation marks, as part of the reading, excepting in cases, where, as might happen on occasion, while introducing amending provisions, punctuation marks are specifically adverted to in the amendments themselves". A Full Bench of the Allahabad High Court in *Hakim Singh* v. *Shiv Sagar*[6], has opined that when a statute was carefully punctuated and there was doubt about the meaning, weight should undoubtedly be given to the punctuation and that punctuations might have

1. 92 L.W. 35: (1979) 1 M.L.J. 253.
2. 1952 S.C.J. 568: 1953 S.C.R. 1: A.I.R. 1952 S.C. 369.
3. (1971) 2 M.L.J. 164.
4. 91 L.W. 642: (1978) 2 M.L.J. 447.
5. (1975) 88 L.W. 255.
6. A.I.R. 1973 All 596.

its uses in some cases but it could not certainly be regarded as a controlling element and could not be allowed to control the plain meaning of a text. In *Lewis Pugh* v. *Ashutosh*[7], it was held that commas were not part of the statute.

On the other hand in *Board of Revenue, Madras* v. *Ramanathan Chettiar*[8], a Division Bench of the Madras High Court observed. "The phraseology of this clause is not very happy, because it is obvious that the words could bear either meaning; but the statute has been punctuated, and we must take the punctuation marks, as part of the statute. If it was intended to read the words 'as obsolete' as governing 'sold' one would expect to find a comma after the word 'sold'. There is none, the comma being put after the word, 'obsolete' ".

This Madras decision has been followed in (1974) Labour and Indus. Cases 1305: (1974) 2 Serv.L.R. 298. The observations of the Rajasthan High Court in *Badrinarain* v. *State*[9], may also be considered:

"So far as the Acts of the Indian Legislature and the Constitution of India are concerned, it has been held that in India, the punctuations in the statutes should not be ignored. We cannot, therefore, ignore the comma after the words, 'by doing any act' ......".

This judgment was based on the decisions reported in *State* v. *Kalekhan*[10]. In the case of *Blanche Somerset Taylor* v. *Charles George Bleach*[11], *Isap Ahmed* v. *A. Ahmadiji*[12]; *Ramanathan Chettiar's case*[13], *Krishnaji Gapol*, In re[14] and *Gopalan* v. *State of Madras*[15].

Justice N. S. Ramaswami in *Ramakrishnan's case*[16]; though not approved of by the Division Bench in *Panthanam Ammal's case*[17], felt that:

"The significant fact to be noted is that after the words 'on the application of a decree-holder' there is no comma. That means that the subsequent clause 'within six months from the date of publication of this Act' has to be tacked on to the clause 'on the application of the decree-holder'......".

Above all, the Supreme Court in its very recent judgment reported in *Mohd. Shabbir* v. *State of Maharashtra*[18], categorically stated:

"On an interpretation of section 27, it seems to us that the argument of Mr. Singh is well founded and must prevail. The words used in section 27, namely 'manufacture for sale, sells', have a comma after each clause but there is no comma after the clause 'stocks or exhibits for sale' ........ The absence of any comma after the word 'stocks' clearly indicates that the clause 'stocks or exhibits for sale' is one indivisible whole and it contemplates not merely stocking the drugs but stocking the drugs for the purpose of sale and unless all the ingredients of this category are satisfied, section 27 of the Act would not be attracted".

Even though no case-law has been referred to in the above-quoted Supreme Court decision, it looks as if the view expressed in *Board of Revenue* v. *Ramanathan*[19], and the like alone has been favoured.

Commas and other punctuation marks, if indiscriminately put, have no significance at all. At the same time, if precisely and rightly put, punctuation marks will enable one to grasp the true and plain meaning. A duty is thus cast upon the draftsmen to punctuate the enactments accurately and carefully.

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7. 56 I.A. 93: 56 M.L.J. 517: 29 L.W. 449: A.I.R. 1929 P.C. 69.
8. 46 M.L.J. 42: 19 L.W. 34: A.I.R. 1924 Mad. 455 at 456.
9. A.I.R. 1957 Raj. 64.
10. I.L.R. 37 Mad. 113: A.I.R. 1914 Mad. 502.
11. A.I.R. 1915 Bom. 50.
12. A.I.R. 1917 Bom. 254 (F.B.).
13. 46 M.L.J. 42: A.I.R. 1924 Mad. 455.
14. A.I.R. 1948 Bom. 360.
15. 1950 S.C.J. 174: (1950) 2 M.L.J. 42: A.I.R. 1950 S.C. 27.
16. (1975) 88 L.W. 255.
17. 92 L.W. 35: (1979) 1 M.L.J. 253.
18. (1979) 1 S.C.C. 568: (1979) Cr.L.J. 466: A.I.R. 1979 S.C. 564 at 565.
19. 46 M.L.J. 42: A.I.R. 1924 Mad. 455.

## DEEP THOUGHT OVER VATSALA v. OFFICIAL ASSIGNEE OF MADRAS REPRESENTING THE ESTATE OF S. V. NAMASIVAYAM, (1979) 1 M.L.J. 92 L.W. 126.

*By*

R. THILLAI VILLALAN, *Madras*.

Ramaprasada Rao, CJ., has given a laudable interpretation to the second proviso to section 10 (1) of the Tamil Nadu Buildings (Lease and, Rent Control) Act (XVIII of 1960) as amended by Act (XXIII of, 1973), explaining the principle of *jus tertii*.

The second proviso of rule 10 (1) of the Act runs as follows:—

"Provided further that where the *tenant* denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim is *bona fide* and if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in the said sections, notwithstanding that the Court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded".

The Chief Justice has stated in the abovesaid *Vatsala's case*[1], as follows:

"Let us consider whether the defence of the tenant in question could be said to be one which is available to such tenants under the second proviso to section 10 (1). *Jus tertii* is a well known principle in law wherein a person whose rights are sought to be interfered with by another takes unbrage under the rights said to be vested in a third-party other than the party opposing him and in certain circumstances, the defence of *jus tertii* is available to the affected party. But in a case like the one under consideration, wherein the Act itself is to protect the tenants from unlawful and unreasonable eviction and is not intended to protect the interests of persons other than the tenants, whether the intendment of the Legislature in accordance with the language of second proviso, to section 10 (1) was and is that the denial of title contemplated in the second proviso would also include the invocation of the doctrine of *jus tertii*. Section 10 (1) provides that the tenants shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section or sections 14 to 16, provided that where the tenant denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim is *bona fide* and if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a civil Court and the Court may pass a decree for eviction or any of the grounds mentioned in the said sections, notwithstanding that the Court finds such denial does not involve forfeiture of the lease or that the claim is unfounded.

It, therefore, follows that if the finding of the Rent Controller is that the denial is not *bona fide*, then the Controller would be entitled to pass an order for eviction. The question that arises in the instant case is whether such a denial as contemplated under the second proviso to section 10 (1) has arisen. The proviso is very clear when it says that the tenant should deny the title of the landlord. It does not say that the tenant can vest the title to the property in his occupation in third parties. This is the concept which is incurred in the principle of *jus tertii*. It is only in cases where the tenant while opposing an application for eviction under the provisions of Act XVIII of 1960, sets up title in himself or herself, the second proviso would come into operation and it is in that context alone, the Rent Controller would have jurisdiction to find whether the denial of title of the landlord and the setting up of such title in himself or herself by the—tenant is *bona fide* or not. I am of the view that it is not open to the tenant to plead, taking advantage of the open language of the second proviso to section 10 (1) that the denial as regards the title of the landlord might even mean and include the vesting of the title to the property

1. (1979) 1 M.L.J. 210 : 92 L.W. 126.

in a third party. On the other hand, I am of the view that such denial of title of the landlord would be the resultant of a claiming of title in the property by the tenant herself or himself and not by setting up title in a third-party".

The Rent Controller must have jurisdiction to give finding. For this purpose, there must be relationship of landlord and tenant between the petitioner and respondent in the case of petitions for evicting tenants. Therefore, there must be acceptance of tenancy but denial of title of the landlord or claim of right of permanent tenancy. If the respondent sets up title in third party, then he will not be a tenant of the petitioner and then, the Rent Controller will have no jurisdiction at all to go into the question whether the denial or claim is *bona fide* one or not. In analogous circumstances in *Rukamoddia Dastagirsab* v. *Basawwa and others*[2], under the Mysore Rent Control Act (XXII of 1961), Nesargi, J., said that:

"Sri K. A. Swami pointed out that in every case under the Act the jurisdictional fact, that relationship of landlord and tenant subsists has to be established and whenever a tenant disputes the status of the landlord the decision on the grounds on which such a dispute is based, cannot be considered as an incidental one, and hence grave consequences in view of the doctrine of *res judicata* and section 48 (6) of the Act would follow, and argued that the Courts functioning under the Act should not be permitted to determine disputes as to the title of the landlord in the guise of settling the jurisdictional fact.

Whether such decision operates as *res judicata*, would depend on the facts and circumstances of each case. But, one thing that is certain is that in view of section 48 (6) of the Act, the decision rendered either by the Court or the District Court or the High Court as the case may be under the Act, becomes final and cannot be called in question in any Court of law, whether in a suit or other proceedings, either by way of appeal or revision. It cannot be disputed that a Court under the Act settles the jurisdictional facts *viz.*, whether there subsists a relationship of landlord and tenant between the parties.

In *Venkatarama* v. *P. H. Seshagiri Rao*[3], it is held that where the tenant questions the status claimed by the applicant for eviction as landlord, the Munsiff cannot make any order under the statute (section 29 of the Act) without first settling the dispute as to the existence of the jurisdictional fact. That jurisdictional fact is the existence of the relationship of landlord and tenant in respect of the premises.

This decision is followed in *Narayana Ray* v. *Appaji Rao*[4]. In that case, a tenant challenged that the property occupied by him was not a 'premises' as defined in the Act and, therefore, the petition filed by the landlord was not competent before the Court functioning under the Act. This Court held that whether the property in question was or was not a 'premises' under the Act was to be decided by the Court functioning under the Act as it was incumbent on it to determine that jurisdictional fact.

In *Hajarabi* v. *Babalal Hasimsaheb*[5], the tenant contended that there was only ostensible title in the petitioner-landord while in fact the petitioner-landlord was only a benamidar for himself (the tenant) and, therefore, there was no relationship of landlord and tenant existing between the parties. The Munsif considered that dispute and directed the petitioners before him to obtain a declaration from the civil Court regarding their title to the properties. This Court in revision held that existence of the relationship of landlord and tenant was a jurisdictional fact and it was incumbent on the Court to determine that

2. A.I.R. 1974 Mys. 46.

3. (1965) 1 Mys.L.J. 560.
4. (1971) 2 Mys.L.J. 370.
5. C.R.P. No. 44 of 1969 dated 25th January, 1971 (Mysore).

fact. It further held that the question of title to the premises and whether the petitioner was the benamidar for the respondent-tenant or not, did not really arise in the proceedings and that question was outside the scope of the Act and that as it did not really arise; it was unnecessary for the Munsif to have directed the petitioners to obtain an adjudication on the question of their contention as to the benami nature of the title alleged by the landlord.

In view of the foregoing it is manifest that existence of relationship of landlord and tenant between the parties is a jurisdictional fact and it is incumbent on the Court functioning under the Act to determine that question. The consistent view taken by this Court as already stated above is that even a dispute relating to the title of the landlord if not complicated, can be decided by the Court, in case it is absolutely necessary to do so, to determine the jurisdictional fact. Now the question would be whether such a decision can be regarded as incidental on the ground that the decision on such a dispute relating to title would have nothing to do with the relief claimed in the proceeding. I am unable to agree with the contention of Sri Krishnaswamy Rao that on the facts and circumstances of the case on hand such a decision can be regarded as incidental".

Therefore if the respondent (tenant) attempts to set up title in a third party, the Rent Controller, will have no jurisdiction to decide the dispute and give finding on the point of denial of title or claiming permanent tenancy.

The intendment of the Legislature is very clear and visible by the guardedly worded proviso. There should be two conditions before the Rent Controller can go into the question of *bona fide* of the denial of title by the tenant. (1) There must be denial by the tenant who accepts the relationship of landlord and tenant by which Rent Controller gathers jurisdiction or authority under the Act; (2) Denial should be on the specified two grounds; (*a*) denial of title of landlord; (*b*) claim of permanent tenancy but not on any other ground especially of setting up title in third-party.

In this connection it will be helpful to look into *Thanikachala Naicker* v. *Vinatheertha Vinayagar Koil by its Managing trustee*[6] which is direct authority, for the proposition that denial must be by the tenant only and it also must be on the ground of setting up title in himself or claiming permanent tenancy and then only the question of *bona fide* will arise. The facts of the case will disclose that the denial made by the tenant is only about the ownership of superstructure on the land leased to him. The relevant portion is:—"One of the contentions raised by the tenant before the Rent Controller was that the building itself had been put up by him that the subject matter of the lease is only the land and that therefore the Rent Controller had no jurisdiction to entertain the petition for eviction. The Rent Controller and the Appellate Authority have given a finding that what was let out was not merely the land but the land with the building. They mainly relied on the rent receipts issued by the landlord to the tenant in which it is not stated that the rent was for land. The receipts are in printed form and it is in Tamil. The words "வீடுகள்/கடைகள்" occur in all the receipts; neither of those two words is struck-off. It is contended on behalf of the tenant that these printed forms where neither the word "வீடுகள்" nor the word "கடைகள்' is struck off do not clinch the issue, that the same is not conclusive to show that the building as such had been the subject-matter of the lease which was in the year 1948 and that the Courts below ought not to have given a finding in favour of the landlord mainly on the basis of the above said receipts. It is further contended that in any event the dispute raised by the tenant regarding ownership of the superstructure is a *bona fide* dispute and it is not within the jurisdiction of the Rent Controller's Court to actually decide the question of title, though in considering whether it has jurisdiction to entertain the petition for eviction or not it can incidentally go into the question of title. In the face of the receipts it cannot be said that there is no *bona fide* dispute regarding the ownership of the superstructure. The only two points the

6. (1974) T.L. N.J. 492.

Rent Controller framed for consideration are about the question of wilful default and that about sub-letting. Incidentally in the course of the order no doubt the Rent Controller discusses the question as to whether the superstructure had been put up by the tenant and therefore the Rent Controller had no jurisdiction. It is not within the jurisdiction of the Rent Controller Court to give a final decision regarding to title the property. That is a question to be decided only by a civil Court. The Rent Controller Court is only to examine whether the denial of title on the part of the tenant is *bona fide* or not".

The tenant can come under the shelter of the second proviso of section 10 (1) of the Act only when he accepts the tenancy but denies the title of landlord by setting up title in himself, not vesting it in third party or claiming permanent tenancy, in addition to the ground of non-avallability of benefit by the principle of *jus tertii*. This is only an *addenda* but not *corrigenda* to the judgment in the above case.

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## METHOD OF ASSESSMENT OF PROPERTY TAX UNDER DISTRICT MUNICIPALITIES ACT — JUDICIAL DECISIONS AND THEIR IMPACT.

*By*

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This article is an attempt to bring to the notice of the State Legislature the impact and consequences created on the mode and basis of assessing property-tax under Municipal and Panchayat Acts by certain decisions of the Supreme Court and the Madras High Court.

As per section 82 of the Tamil Nadu District Municipalities Act "Every building shall be assessed together with its site and other adjacent premises occupied as an appurtenance thereto. The annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year (less a deduction, in the case of buildings, of ten per cent. of that portion of such annual rent which is attributable to the buildings alone, apart from their sites and the adjacent lands occupied as an appurtenance thereto) and the said deduction shall be in lieu of all allowances for repairs or on any other account whatsoever. In cases where annual rental value cannot be fixed, the annual value of the premises shall be deemed to be six per cent. of the total of the estimated value of the land and the estimated present cost of erecting the building after deducting for depreciation a reasonable amount which shall in no case be less than ten per centum of such cost".

The State Government, under section 82 (3), was empowered to make necessary rules regarding the manner of valuing the land, the present cost of erecting the building and the amount to be deducted for depreciation. Schedule IV, rule 6 of the said Act gives an absolute power to the Executive Authority to determine its value of any land or building for purpose of the property tax. Schedule IV of section 82 (1), does not give any indication as to how the valuation of the property is to be calculated or arrived at.

Under section 120 of the Tamil Nadu Panchayat Act of 1958, house tax is to be levied on the basis of classified plinth area or on the basis of annual rental value or capital value or on the combination of any two or more of the above basis. The Government, under section 120 (4), is empowered to make necessary Rules for ascertaining the annual or capital value. The Madras Panchayat Rules, Chapter IV (Notification No. 40) lays down the manner of ascertaining the annual or capital value of houses. It is laid down that the capital value of the house shall be deemed to be the total of the estimated value of the land and the estimated present cost of erecting the house after deducting for depreciation a reasonable amount which shall in no case be less than 10 per centum of such cost. The annual value of the house will be the rent for which it may reasonably be expected to let from month to month or from year to year less a deduction of 10 per centum of such annual rent. Here

also it is to be noticed that no indication as to how the valuation of the property, either rental or capital value, is to be arrived at. In both these enactments, the term used as far as the annual rental value is concerned is "the rent at which the property may reasonably be expected to let from month to month or year to year". Therefore an Executive Officer has to decide the rental value according to the circumstances prevailing in the town or locality and the amenities enjoyed in respect of the building. Therefore, naturally when there were no written rules, the Executive Officers were relying upon their "estimates" and "best of judgments". The "estimates" are again checked by the concerned officer at the time of revision or by the local body at the time of appeal by the assessee.

This procedure was in existence and in fact was accepted by the assessees for a very long time. The civil Court is not an appellate authority in respect of the quantum of the value arrived at by the Executive Officers. It was held in *Madurai Municipality through its Commissioner, D. Gnanavolivu* v. *R. Ramakrishnan, Sundaram Chettiar and another*[1], that fair rent fixed under the House Rent Control Act may be taken into consideration by the Municipal Authorities in computing the annual value under section 82 of the Madras District Municipalities Act, but they are not bound to take such fair rent, as necessarily the rent for which the building may reasonably be expected to be let within the meaning of the section. It was further held that the determination of fair rent under Rent Control Act is to a certain extent artificial and hypothetical and may not represent the rent at which the premises could reasonably be expected to be let during the particular year of assessment to property-tax. *A. S. Kuppusamy Iyer* v. *The Tirunelveli Municipal Council represented by the Commissioner*[2], went to the extent of stating that for the purpose of ascertaining the reasonableness of the rental value, the local body should not be guided by the fair rent fixed by the Rent Controller under the Rent Control Act. It is evidently clear that Rent Control Act and the Municipalities or Panchayats Act are distinct, separate and special enactments. It is submitted that the notion of fair rent under Act XVIII of 1960 cannot be imported to the District Municipalities Act or the Panchayats Act. Both these enactments have no connection with each other, even though both have been passed by the same Legislature.

The Supreme Court in *Guntur Municipal Council* v. *The Guntur Town Rate-payers Association etc.*[3], following; *Corporation of Calcutta* v. *Padma Deba*[4], laid down that the municipality has to look into and be bound by the fair and standard rent which would be payable for particular premises under the Rent Control Act in force during the year of assessment. It went one step further and stated that there is no distinction between buildings, the fair rent of which has actually been fixed by the Rent Controller and those in respect of which no such has been fixed. The Supreme Court expects the Municipal Authorities to arrive at their own figure of fair rent in accordance with the principles laid down in the Rent Control Act. This decision of the Supreme Court has been followed by the Madras High Court in *K. M. S. Abdul Hasan* v. *The Thiruvarur Municipality represented by the Commissioner, Municipal Office, Thiruvarur*[5]. Justice Paul quoting, *Guntur Municipal Council* v. *Guntur Town Rate-payers Association etc*[3], held that the Municipality should have arrived at the annual rental value in accordance with the principles laid down by the Supreme Court in the aforesaid case. It held that the Commissioner had arbitrarily fixed, though in a *bona fide* manner, the reasonable rent that the properties would fetch. Hence as per this decision the provisions of Act XVIII of 1960 are to be followed strictly. In *S. Ramasami* v. *The Commissioner, Municipal Corporation, Madras*[6], Justice Ramanujam held that the

1. (1955) 2 M.L.J. 369: 69 L.W. 583: I.L.R. (1956) Mad. 530: A.I.R. 1956 Mad. 49.
2. (1955) 2 M.L.J. 467.
3. (1971) 2 M.L.J. (S.C.) 7: (1971) 2 S.C.J. 142: (1971) 2 An.W.R. (S.C.) 7: (1971) 2 S.C.R. 423: A.I.R. 1971 S.C. 353.
4. (1962) 3 S.C.R. 49: A.I.R. 1962 S.C. 151.
5. (1978) 1 M.L.J. 121: 91 L.W. 61.
6. (1977) 2 M.L.J. 457: 90 L.W. 713: A.I.R. 1978 Mad. 141.

annual rental value of the building has to be determined only with reference to the fair rent formula provided for in the Tamil Nadu Act XVIII of 1960, and that it should be strictly followed in respect of the buildings to which the abovesaid Act applies. His Lordship following *Guntur Municipal Council* v. *Guntur Town Rate-payers Association etc.*[7], held that *Madurai Municipality's Case*[8], was no longer good law.

In *New Delhi Municipal Committee* v. *M. N. Soi and another*[9], it is laid down that the Assessing Authorities are obliged not to assess at a higher rental value than the "Standard Rent" fixed under the Rent Control Legislation. Justices M. H. Beg and P. N. Shingal, held as follows:—

"Thus whatever may be our views on the reasonableness of tying down assessment, for the purposes of rating, to the concept of a rent which has been held to be fair rent in the past but does not a bear a real relationship to the prevailing conditions of the market for accommodation if it was uncontrolled, we find it impossible to get over the *ratio decidenti* of this Court in *Smt. Padma Deb's Case*[10]' which we are bound to follow. This was that, if a rent which is higher than that which can be legally demanded by the landlord and actually paid by a tenant, despite the fact such violation of the restriction on rent chargeable by law is visited by penal consequences, the Municipal authorities cannot take advantage of this defiance of the law by the landlord. Rating cannot operate as a mode of sharing the benefits of illegal rack-renting indulged in by rapacious landlords for whose activities the law prescribes condign punishment". Ramaprasada Rao, CJ., in *C. G. Ramanathan* v. *Commissioner, Corporation of Madras*[11], has held that in order to arrive at the annual valuation of the premises, which is ordinarily let out and which is within the jurisdiction of the Corporation of Madras, the taxing authorities are entitled to assess and estimate the rent which the property may reasonably be expected to fetch. What is 'reasonably be expected to fetch' is a matter which varies from case to case; it all depends on the facts of each case. If there is no proof of letting the building prior to the challenged valuation for the purpose of fixing the property tax, then the yardstick adopted by the Corporation in fixing such reasonable rent can be scrutinized by the authorities in the higher hierarchy. Quoting *Municipal Counil, Tirunelveli* v. *Haniffa*[12], his Lordship observed that, though the Municipality while determining the annual rental value, was not bound by the actual rent paid by the tenant, the rent fixed under the lease deeds should normally be taken as the best *prima facie* evidence, in the absence of proof that any other element was responsible for fixing up a lower rent, and that, if the Municipality wanted to enhance the rent, there must be proof that a hypothetical tenant intending to use the property for the same purpose would pay more. But in this decision the earlier decisions of the Supreme Court have not been referred to. Probably the Chief Justice had pronounced this judgment only on the facts of the case because there was clear evidence of the quantum of the rent payable by the tenant *viz.*, Parry & Co., paying Rs. 900 per month as rent.

Thus the series of decisions of the Supreme Court and of our High Court have laid down that the provisions of the Rent Control Act —now Act XVIII of 1960 are to be strictly followed in assessing the property tax. These decisions have created various practical difficulties. No executive authority will be able to arrive at the fair rent except either by spending almost all its time in such calculation or by expending huge money in engaging qualified Engineers for this purpose. Quinquennial revisions are done once in five years. When the cost of administration has increased, the taxation also will have to be increased in proportion at least. To tax a building as per provisions of Act XVIII of 1960 will only create standard and fixed income to the Local Body. But when the expenditure increases due to various reasons, the Local Body may not be able to provide

7. (1971) 2 M.L.J. (S.C.) 7: (1971) 2 S.C.J. 142: (1971) 1 An.W.R. (S.C.) 7: (1971) 2 S.C.R. 423: A.I.R. 1971 S.C. 353.

8. (1955) 2 M L J. 369: I.L.R. (1956) Mad. 530.

9. (1976) 4 S.C.C. 535: (1977) 1 S.C.R. 731: A.I.R. 1977 S.C. 302.

10. (1962) 3 S.C.R. 49: A.I.R. 1962 S.C. 151.

11. (1979) 1 M.L.J. 421.

11. (1969) 2 M.L.J. 495.

amenities with such fixed and unalterable tax income.

When such difficulties were expressed to their Lordships of the Supreme Court in *Guntur Municipal Council* v. *Guntur Town Rate-payers Association etc.*[13], the answer was "It has been pointed out by the learned counsel for the respondents that according to the rules contained in the fourth Schedule to the Municipalities Act, the assessment books have to be revised once in every five years and the quinquennial assessment thus made enures for that period. But it appears from the rules that a procedure has been prescribed for changing the assessment whenever a case is made out for doing so. We are not concerned with the procedural difficulties which may be experienced. We have to declare what the law is and as appears to be well-settled the assessment of valuation for the purpose of tax must be made in accordance with and in the light of the provisions of the Rent Control Act which would be in force during the period of assessment".

In view of these decisions several suits representing the entire assessees of a Town or Panchayat have been filed. Temporary and perpetual injunctions had been granted restraining the authorities from collecting the enhanced tax. But unfortunately, to quote *Vaddebayina Tulasamma* v. *Sesha Reddy*[14], the Legislature for all these years right from 1962 upto now did not care to step in to remove the constructional dilemma facing the Courts and adopted an attitude of indifference and inaction, untroubled and unmoved by the large number of cases on this point, encumbering the files of different Courts in this State, when by the simple expedient of an amendment to Local Bodies Act, it could have put an end to needless litigation. This is a classic instance of a statutory provision which by reason of inept draftsmanship, has created hardship for litigants and local bodies but proved a paradise for lawyers. To quote further in *Veddebayina Tulasamma* v. *Sesha Reddy*[14], "it illustrates forcibly the need of an authority or body to be set up by the Government or the Legislature which would constantly keep in touch with the adjudicatory authorities in the country as also with the legal profession and immediately respond by making recommendations for suitable amendments whenever it is found that a particular statutory provision is, by reason of inept language or unhappy draftsmanship, creating difficulty of construction or is otherwise inadequate or defective or is not well conceived and is consequently counter-productive of the result it was intended to achieve. If there is a close inter-action between the adjudicatory wing of the State and a dynamic, ever-alert authority or body which responds swiftly to the drawbacks and deficiencies in the law in action, much of time and money, which is at present expended in fruitless litigation would be saved and law would achieve a certain amount of clarity, certainity and simplicity which alone can make it easily intelligible to the people."

Unless and until the Legislature amends the Municipal and Panchayat Acts by setting up definite Rules and Regulation for the method of assessing the property assessment, the administration of the local bodies will come to a halt. The assessees also cannot be expected to rush to civil Courts very often at heavy cost to redress their grievances regarding property assessment.

Hence, in the interest of assessees, local bodies and the Government, it is submitted, it is high time that the Legislature should step in to bring suitable amendments in the District Municipalities Act and Tamil Nadu Panchayats Act regarding the mode of assessing the property tax taking into consideration the dictum laid down in the decision in *Guntur Municipality* v. *Guntur Town Rate-payers Association*[15] and decisions of the Madras High Court.

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[END OF VOLUME (1979) 1 M. L. J. (JOURNAL)].

13. (1971) 2 M.L.J. (S.C.) 7: (1971) 2 S.C.J. 142: (1971) 2 An. W.R. (S.C.) 7: (1971) 2 S.C.R. 423: A.I.R. 1971 S.C. 353.

14. (1978) 1 S.C.J. 29: (1978) 1 An.W.R. (S.C.) 6: (1977) 3 S.C.C. 99: (1977) 2 A.P.L.J. (S.C.) 14: (1977) 3 S.C.R. 261: A.I.R. 1977 S.C. 1944 at 1946.

15. (1971) 2 M.L.J. (S.C.) 7: (1971) 2 S.C.J. 142: (1971) 2 An.W.R. (S.C.) 7: (1971) 2 S.C.R. 423: A.I.R. 1971 S.C. 353.